Supreme Court, U.S.
FILED
DEC 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-639

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

IN RE: KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen, deceased, pursuant to the laws of the Federal Republic of Germany

EDGARDO L. PARUNGAO,
Petitioner,

v.

KLAUS HUBERT GOERG,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Eleventh Circuit's construction of section 304 of the Bankruptcy Code—allowing the representative of a German bankruptcy proceeding, which involves a German decedent's estate with assets in the United States, to maintain an ancillary proceeding pursuant to section 304—so depart from precedent, Congressional intent, and the usual course of judicial administration as to demand review by this Court?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Factual Background.[1]

This case involves citizens of the Federal Republic of Germany ("West Germany") who have fully litigated their rights, and lost, in bankruptcy proceedings in the

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[1] Petitioner generally stated the facts correctly, but he failed to reveal what is at the heart of this case, the flagrant attempts of the heirs of Heinz Guenter Kaussen to circumvent orders entered against them by the bankruptcy courts of their homeland, the Federal Republic of Germany.

courts of their own country. These German citizens are now seeking to circumvent the orders entered against them and to relitigate issues previously decided by invoking the laws of numerous jurisdictions around the globe. At issue is the bankruptcy estate of the late Heinz Guenter Kaussen ("Kaussen"), himself a citizen and resident of West Germany until his death by suicide in 1985. The German bankruptcy estate includes substantial assets located in West Germany, Ireland, Canada, California and Georgia.

At the time of Kaussen's death, his liabilities exceeded his assets by more than 55 million dollars. On January 24, 1986, the Cologne Local Court entered an Order of Adjudication determining that the Kaussen estate was insolvent and appointing Dr. Klaus Hubert Goerg (Respondent here) as the bankruptcy trustee to liquidate the estate for the benefit of Kaussen's creditors worldwide.

The sole beneficiary of Kaussen's will, Ingeborg Skowronek, by whom Kaussen had four daughters, vigorously contested the bankruptcy petition in the West German courts, but lost in the Cologne Local Court and on several appeals.[2] The court of last resort in West Germany affirmed the order bestowing upon Dr. Goerg all powers necessary to take possession of Kaussen's assets, wherever located, and to liquidate them for the benefit of creditors. The West German courts' orders expressly pro-

[2] The Cologne Local Court's Order of Adjudication was affirmed on appeal by the Cologne Regional Court on February 17, 1986, and by the Cologne Higher Regional Court of Appeals on March 3, 1986, and April 28, 1986. These opinions are included in the Respondent's Appendix at pages 1a, 6a, 15a, and 26a, respectively. The Federal German Constitutional Court, on June 6, 1986, refused to review this matter for the reasons set forth in its opinion included at page 32a of the Respondent's Appendix. Kaussen's estate is now being liquidated under the supervision of the Bankruptcy Division of the Cologne Local Court, pursuant to § 215 of the Konkursordnung (§ 215 of the German Bankruptcy Act).

hibit Kaussen's heirs from interfering with Dr. Goerg's administration of the estate, and fully and finally adjudicate the rights of Kaussen's heirs, all of whom are German citizens.

Evidently anticipating Ms. Skowronek's efforts to circumvent their decrees, the West German courts not only granted the administrator's bankruptcy petition over her objections, but also affirmatively imposed upon her the obligation to provide Dr. Goerg information regarding any and all property of the estate, wherever located, and ordered her to execute powers of attorney in favor of Dr. Goerg to permit him to take possession of all of Kaussen's properties in West Germany and abroad. Ms. Skowronek refused to comply with the orders of the West German courts and fled to Canada, where she apparently has taken up permanent residence.

Having lost in the West German courts, Kaussen's heirs, in contravention of those courts' decrees, nevertheless proceeded to assert their claims in the courts of other jurisdictions, including the state courts of Fulton County, Georgia and various courts in California and Canada.[3] In addition, in proceedings conducted without regard to those pending in the Federal Republic of Germany, the Georgia administrator of the Kaussen estate (Petitioner here), a former employee of Kaussen and close associate of both Kaussen and Ms. Skowronek, has independently taken possession of the property of the estate located in Georgia.

On June 13, 1986, Dr. Goerg filed a petition under 11 U.S.C. § 304 (1982) ("section 304") seeking recognition and enforcement of the West German decrees according to the well-established principles of comity embodied in

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[3] Included in the Respondent's Appendix at page 49a, is a pertinent judgment of the Court of Appeal, Province of Quebec, District of Montreal, issued on February 8, 1988.

section 304. *Reproduced at* Respondent's Appendix p. 58a. The petition calls upon the U.S. Bankruptcy Court for the Northern District of Georgia to assist in implementing the orders entered by the West German bankruptcy court and to prevent the Kaussen heirs from relitigating in the United States issues already decided against them in bankruptcy proceedings in West Germany.[4]

B. The Statute.

Congress enacted section 304 in 1978 to allow foreign representatives of foreign bankruptcy-like proceedings to enforce judgments arising out of those foreign proceedings in the United States. Under section 304, a foreign representative can institute an action ancillary to the foreign proceeding in a U.S. bankruptcy court, and is thereby relieved of bringing multiple actions in order to marshal assets found in several jurisdictions. Section 304(a), the subsection specifying eligibility requirements for ancillary assistance, states that a foreign representative in a foreign proceeding may commence a case ancillary to a foreign proceeding by filing a petition under section 304 with the bankruptcy court. Section 304 (b) specifies the relief available to foreign representatives. The factors that a bankruptcy court must consider in deciding what relief, if any, is appropriate are set forth in section 304(c). Those factors were intended to assure an economical and expeditious administration of the foreign estate consistent with just treatment of all claimants and the principles of comity.

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[4] In November, 1988, following the remand of this case by the Eleventh Circuit, Dr. Goerg filed an amended and restated petition in the Bankruptcy Court setting forth developments in the case since that court's initial opinion, including a report on the status of the various collateral actions pending in the courts of Georgia and California involving variously Dr. Goerg, the two state probate administrators, the German heirs, and certain German creditors. *See* Respondent's Appendix at p. 67a.

C. Decisions Below.

The issue facing the Bankruptcy Court in this case involved only section 304(a), the section governing Dr. Goerg's eligibility to seek ancillary relief pursuant to section 304. The Bankruptcy Court determined that it did not have jurisdiction even to consider Dr. Goerg's section 304 petition because it involved a decedent's estate, which would not qualify as a "debtor" in a full bankruptcy case under the U.S. Bankruptcy Code.

In reaching its decision, the Bankruptcy Court noted the paucity of case law available to guide its decision and gave a very narrow reading to the applicable statutory language. Section 304(a) states that a section 304 petition may be filed by a "foreign representative" in a "foreign proceeding." In defining the term "foreign proceeding," section 101(22) of the Bankruptcy Code speaks of a proceeding "in a foreign country in which the *debtor's* domicile, residence, principal place of business, or principal assets were located" at the commencement of the proceeding. 11 U.S.C. § 101(22) (Supp. IV 1986) (emphasis added) ("section 101(22)"). Because the statute employs the possessive adjective "debtor's" to modify the word "domicile," the Bankruptcy Court concluded that judisdiction under section 304 is limited to cases in which the subject of the foreign insolvency proceeding qualifies as a "debtor" under the U.S. Bankruptcy Code. *In re Goerg*, 64 B.R. 321, 324 (Bankr. N.D. Ga. 1986). The Court held that it did not have jurisdiction to consider Dr. Goerg's petition to initiate an ancillary proceeding because a decedent's estate may not be a debtor under the Bankruptcy Code. *Id.* The Bankrutcy Court, however, recognized that its decision was contrary to the procomity purpose of the statute. It wrote:

> Here we have German nationals who have lost their appeals to assert their interest in Kaussen's estate in the Courts of the Federal Republic of Germany, turning to the probate laws of the State of Georgia.

> In Georgia, they will receive what they could not from their own home courts . . . . As the facts now appear before the Court, this is mainly a contest between the German bankruptcy trustee and Kaussen's heirs. The heirs have lost in their own home courts and are now pursuing their claims in a more favorable forum, to wit: the Probate Court of Fulton County, Georgia. It does seem to be a great affront to the principles of comity to allow this to occur.

Id. at 325. The District Court, following similar reasoning, affirmed the decision of the Bankruptcy Court. *In re Klaus Hubert Goerg*, No. C-86-2096-A, slip op. at 4-6 (N.D. Ga. January 8, 1987).

On appeal, the Eleventh Circuit reversed and held that section 304 provides for jurisdiction over proceedings ancillary to foreign insolvency proceedings so long as the entity that is the subject of the foreign proceeding qualifies for insolvency administration under the subject foreign law. *In re Klaus Hubert Goerg*, 844 F.2d 1562, 1568 (11th Cir. 1988). In reaching its decision, the Eleventh Circuit, like the Bankruptcy Court, focused on the word "debtor" in the section 304 context. Unlike the Bankruptcy Court, however, the Eleventh Circuit found the term to be ambiguous. "Debtor" could refer to either the U.S. Bankruptcy Code's definition of debtor, or the requisite foreign law's definition of debtor. *Id.* at 1567. Because of this ambiguity, the Eleventh Circuit stated that it must choose the alternative that best advances the purpose of section 304. *Id.* at 1567.

The Eleventh Circuit then examined the purpose of section 304, and it recognized that Congress enacted the section to empower bankruptcy courts to aid foreign courts by giving effect to decisions in foreign insolvency proceedings. The section, therefore, merely provides for cases ancillary to foreign proceedings and does not re-

quire the commencement of full bankruptcy cases in which the bankruptcy courts administer assets. *Id.* at 1567. Because the focus of section 304 is to make U.S. enforcement powers available to foreign representatives, the Eleventh Circuit determined that looking to the law of the place of the foreign proceeding for the definition of "debtor" best fulfilled section 304's pro-comity goals. *Id.* at 1568. Therefore, because a decedent's estate qualifies as a debtor under German law, the Eleventh Circuit directed the Bankruptcy Court to entertain Dr. Goerg's section 304 petition. Petitioner seeks review of this decision.

D. Basis of Federal Jurisdiction.

Jurisdiction of the Eleventh Circuit is conferred by 28 U.S.C. § 1291 (1982).

Jurisdiction of the District Court is conferred by 28 U.S.C. §§ 1331 and 1334 (1982).

Jurisdiction of the Bankruptcy Court is conferred by 11 U.S.C. § 304 (1982).

REASONS FOR DENYING THE WRIT

This case presents no issues requiring Supreme Court review. The Eleventh Circuit's decision construing section 304 of the Bankruptcy Code is consistent with Congressional intent. It does not disturb the normal course of judicial administration or the allocation of jurisdiction between the federal and state courts. Moreover, because no other United States Court of Appeals has yet addressed the same issue, the Eleventh Circuit's decision creates no conflict among the circuits. Finally, the opinion concerns a point of statutory construction that is likely to have an extremely limited impact because it will affect very few potential litigants. Supreme Court review of this matter is, therefore, not necessary, and certiorari should be denied.

I. THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH CONGRESSIONAL INTENT THAT SECTION 304 ESTABLISH A PROCEDURE TO EXTEND COMITY TO FOREIGN INSOLVENCY PROCEEDINGS.

A. Congress Intended Section 304 as a Recognition and Enforcement Proceeding to Prevent Problems of Relitigation, Inconsistent Judgments, and Inequitable Treatment of Claimants That Previously Plagued Insolvency Proceedings Involving Multinational Estates.

Before 1978, no federal forum was available to foreign bankruptcy trustees seeking recognition of judgments rendered in foreign insolvency proceedings involving multi-national estates. Foreign representatives, therefore, were often forced to bring multiple proceedings under the laws of various states and nations to marshal the assets of such estates. Such multiple proceedings often resulted in a host of inefficiencies, inequities and inconsistent results—the dismemberment of international estates through the application of diverse local laws not designed to respond to the equities presented by complex international bankruptcy cases; relitigation of issues by disappointed claimants attempting to circumvent the judgments of the courts of other nations; redundant administrative costs to already insolvent estates; and inequitable distributions of assets among creditors and other claimants depending upon the jurisdiction or jurisdictions in which claims were filed. *See Cunard Steamship Co. v. Salen Reefer Services, A.B.*, 773 F.2d 452 (2d Cir. 1985); *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982); H.R. Rep. No. 595, 95th Cong., 1st Sess. 324-325 (1977) ("House Report"); S. Rep. No. 989, 95th Cong., 2d Sess. 35 (1978) ("Senate Report"); Gallagher & Hartje, *The Effectiveness of Section 304 in Achieving Efficient and Economic Equity in Transnational Insolvency*, 1983 Ann. Surv. Bankr. L. 1 (1983) ("Gallagher & Hartje"); Un-

ger, *United States Recognition of Foreign Bankruptcies*, 19 Int'l. Law. 1153 (1985).

In 1978, to combat this problem, Congress enacted section 304. The section authorizes bankruptcy courts, in cases ancillary to foreign proceedings, to recognize the judgments of, and to assist, foreign courts that have jurisdiction to administer foreign estates owning property in the United States but that lack the power to enforce those judgments in this country. In such ancillary proceedings, U.S. bankruptcy courts can enforce judgments entered in foreign insolvency proceedings by enjoining actions against property of the foreign debtor, enjoining enforcement of judgments against such property, ordering turnover of such property to foreign representatives, and ordering other relief. 11 U.S.C. § 304(b). It thereby allows U.S. bankruptcy courts to fashion relief that promotes "economical and expeditious administration" of foreign estates owning U.S. property, consistent with "[p]rinciples of international comity and respect for the judgments and laws of other nations . . . ." House Report, 324-325; Senate Report, 35.

Ancillary proceedings under section 304 do not require bankruptcy courts to conduct full bankruptcy administrations pursuant to U.S. bankruptcy law. Instead, U.S. bankruptcy courts, in effect, lend their equitable powers over the local *res* to the foreign court. As two commentators have noted:

> Section 304 is a creature very different from any of the other approaches to American bankruptcy cases under the Code. Under Section 304, a qualifying foreign representative is able to bypass the usual administrative requirements of a full-blown bankruptcy case. There is no "debtor." No administration is required, or appropriate. The proceeding is purely in rem. The proper role of a Section 304 case is the extension of American equitable power to a

> . . foreign court in order to preserve the principle of equality economically achieved.

Gallagher & Hartje at 19.

Cunard Steamship Co. v. Salen Reefer Services, A.B., 773 F.2d 452 (2d Cir. 1985), the only other circuit court decision discussing section 304, is consistent with this view of the statute. In that case, the district court had vacated a domestic attachment and enforced a stay issued in a Swedish bankruptcy proceeding. *Id.* at 454. The Second Circuit upheld the decision, noting that, although the district court did not err in enforcing the Swedish stay on grounds of comity alone, it should have referred the case to its bankruptcy unit for section 304 proceedings because such proceedings would have been more appropriate. *Id.* at 455. In a detailed analysis of the nature of section 304, the Second Circuit emphasized that "[t]he ancillary proceeding was conceived as a more efficient and less costly alternative to commencing a plenary proceeding which would be duplicative of a foreign proceeding." *Id.* at 456. The Second Circuit, like the Eleventh Circuit in this case, also recognized the importance of comity to the ancillary scheme and the abuses possible if there were no mechanism to facilitate the extension of comity:

> The rationale underlying the granting of comity to a final foreign judgment is that litigation should end after the parties have had an opportunity to present their cases fully and fairly to a court of competent jurisdiction. The extending of comity to a foreign bankruptcy proceeding, by staying or enjoining the commencement or continuation of an action against a debtor or its property . . . enables the assets of a debtor to be dispersed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion.

Id. at 457-58.

B. The Eleventh Circuit Decision That the Word "Debtor" in the Section 304 Context Refers to the Foreign Debtor as Defined by the Law of the Foreign Proceeding Is Consistent With Congressional Intent.

In this case, the Eleventh Circuit construed section 304 to give effect to its pro-comity purpose. In analyzing the section, that court determined that the word "debtor's" in the Bankruptcy Code definition of "foreign proceeding" was susceptible to more than one interpretation. *In re Goerg*, 844 F.2d at 1567. It therefore turned to the purpose of the statute to construe it, and found:

> Because the focus is on making United States processes available in aid of foreign proceedings, not actual bankruptcy administration, it would make little sense to require that the subject of the foreign proceeding qualify as a "debtor" under United States bankruptcy law. *See* Boshkoff, *United States Judicial Assistance and Cross-Border Insolvencies*, 36 Int'l & Comp. L.Q. 729, 740-41 (1987); Klocker, *Foreign Debtors and Creditors Under United States and West German Bankruptcy Laws: An Analysis and Comparison*, 20 Texas Int'l L.J. 55, 90 (1985). Indeed, in light of the comity concerns that induced Congress to enact section 304, it would make eminent sense for Congress to define expansively the class of foreign insolvency proceedings for which ancillary assistance is available.

Id. at 1568. Thus, the Eleventh Circuit held that an entity that is properly subject, under applicable foreign law, to a "foreign proceeding" may seek ancillary assistance under section 304 whether or not it qualifies as a debtor under U.S. law.

The Eleventh Circuit's construction of the statute is correct. Subparagraph (a), the portion of section 304 dealing with eligibility to file a petition, provides that a "foreign representative" in a "foreign proceeding" may

commence a section 304 action. Section 101(22) defines a "foreign proceeding" as a

> proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge or effecting a reorganization.

This definition is broad and includes all foreign proceedings having a bankruptcy-like purpose. The definition identifies a class of foreign proceedings based on their purpose and does not suggest that any law other than the law of the foreign forum should govern eligibility for the foreign proceeding or for section 304 relief. *Id.*

The Petitioner's argument that the word "debtor's" in the definition of foreign proceeding "straightforwardly" imposes an additional eligibility requirement simply ignores the context in which the word appears. If Congress had intended to require entities to qualify as debtors under the U.S. Bankruptcy Code before being eligible for ancillary relief, it easily could have done so in section 304(a), the eligibility provision of section 304, rather than inserting this additional substantive requirement in a definitional section.

The Petitioner also argues that, because the Uniform Probate Code provided "procedures for the ancillary administration of foreign decedents' estates" at the time section 304 was enacted, Congress intended to exclude foreign decedents' estates, which do not qualify as debtors under U.S. bankruptcy law, from eligibility for ancillary proceedings. The Petitioner's argument, however, ignores that Congress's express concern in enacting section 304 was to provide an efficient means of evaluating, recognizing, and enforcing the decrees of foreign courts rendered in bankruptcy-like proceedings. The presence in

section 304(c) of standards for evaluating foreign laws evidences Congress's intent that the section be applied notwithstanding differences between U.S. law and the law of the foreign proceeding. Given that Congress realized that there would be differences between U.S. and foreign law and made provisions for dealing with those differences, the mere fact that the Uniform Probate Code (which even now has been adopted by only fifteen states [5]) arguably overlaps with section 304 is no reason to infer that Congress intended to exclude from section 304 relief all bankruptcy proceedings involving insolvent foreign decedents' estates.

Finally, the Petitioner argues that the abstention provision of section 1334(c)(2) of Title 28 of the U.S. Code indicates that the Eleventh Circuit's decision is inconsistent with Congressional intent. The abstention provision cited by the Petitioner, however, applies to actions that can be timely adjudicated in a state forum.[6] Section 304 is predicated on the idea that multiple uncoordinated proceedings cannot efficiently administer a multi-jurisdic-

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[5] Uniform Probate Code (U.L.A.), Table of Jurisdictions Wherein Code Has Been Adopted (Supp. 1988).

[6] 28 U.S.C. § 1334(c)(2) provides that:

> Upon timely motion of a party in a proceeding based upon State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

28 U.S.C. § 1334(c)(2) (Supp. IV 1986).

tional estate. Congress intended section 304 to replace the patchwork of American choice-of-law rules with a single recognition and enforcement standard to which a representative of a foreign decedent's estate can look. In addition, the special abstention provision of section 305 (a)(2) of the Bankruptcy Code, providing that bankruptcy courts may dismiss or suspend proceedings when there is pending a foreign proceeding, suggests that Congress intended that deference be given to foreign proceedings.[7]

The Eleventh Circuit's construction of section 304 is consistent with the purpose of the statute. It makes it possible for the bankruptcy court to thwart the attempts of German litigants to relitigate claims that they fully litigated and lost in the court of last resort in their home country. Such an attempt by one claimant to grab a disproportionate amount of an insolvent estate's assets, in direct contravention of orders to which it was subject and to the detriment of other claimants, is a paradigm example of the behavior section 304 was designed to prevent.

Thus, the Eleventh Circuit's decision promotes Congress's intent to eliminate the problems of relitigation, forum shopping, and inconsistent treatment of claimants that were prevalent before section 304's enactment. It will permit U.S. bankruptcy courts to recognize and enforce the judgments of courts in which foreign proceedings are pending, thereby allowing for administration un-

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[7] Section 305(a)(2) provides as follows:

> (a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if—
>
> . . .
>
> (2)(A) there is pending a foreign proceeding; and
>
> (B) the factors specified in section 304(c) of this title warrant such dismissal or suspension.

11 U.S.C. § 305 (1982).

der the law of a single forum notwithstanding minor differences between the law of that forum and U.S. law.

II. THE ELEVENTH CIRCUIT'S OPINION DOES NOT DEPART FROM THE USUAL COURSE OF JUDICIAL ADMINISTRATION AND THEREFORE DOES NOT CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Petitioner has argued that the Eleventh Circuit's decision departs from the usual course of judicial proceedings because the decision will result in federal probate administration and will cause the bankruptcy courts to be inundated with requests to conduct probate administrations of solvent foreign decedents' estates owning property in the United States. Thus, the Petitioner asserts that review by this Court is required. However, as more fully argued below, the Eleventh Circuit's decision will not affect judicial administration in the manner suggested by the Petitioner. The Eleventh Circuit specifically determined that section 304 does *not* involve federal probate administration. Further, bankruptcy courts will not be flooded with requests to administer solvent foreign decedents' estates because the Eleventh Circuit's decision did not create an entitlement to relief under section 304 for solvent foreign decedents' estates.

A. Because the Eleventh Circuit Concluded That Ancillary Proceedings Do Not Involve Federal Administration of Probate Estates, the Petitioner's Concern About Standardless Federal Probate Administration Is Misplaced.

The Petitioner urges this Court to review the decision below because "the Eleventh Circuit's conclusion that bankruptcy jurisdiction extends to the administration of a foreign decedent's estate 'has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision.'" Petition at 14. The Petitioner argues that bank-

ruptcy courts, unlike state courts, lack the statutory authority and specific statutory guidelines necessary to administer a probate estate effectively. Petition at 14. The Petitioner goes on to detail the horrors and uncertainties that he imagines would result from such an administration. Petition at 14-16.

The Petitioner's argument fails because the Eleventh Circuit expressly determined that section 304 does *not* provide for bankruptcy administration of the foreign estate. *See In re Goerg*, 844 F.2d at 1568. The statute merely provides a standard and mechanism for the recognition of judgments and orders arising out of foreign proceedings. The Eleventh Circuit wrote:

> The filing of a Section 304 petition does not commence a full bankruptcy case; a Section 304 case is an ancillary case in which a United States bankruptcy court is authorized to apply its processes to give effect to orders entered in a foreign insolvency proceeding. . . . Because the focus is on making United States processes available in aid of foreign proceedings, *not actual bankruptcy administration*, it would make little sense to require that the subject of the foreign proceeding qualify as a "debtor" under United States bankruptcy law.

Id. at 1567-1568 (emphasis added).

It would be nonsensical for this Court to review the Eleventh Circuit's decision because the Petitioner disagrees with something the Eleventh Circuit did not hold. Contrary to the Petitioner's suggestion, neither the Eleventh Circuit nor the Respondent has ever suggested that the bankruptcy court should conduct a federal common-law probate administration. A bankruptcy court, in extending section 304 jurisdiction to a foreign decedent's estate, *will not be required* to adjudicate "issues of year's support, lien priorities, administrator's expenses, etc." (Petition at 16), under bankruptcy law. The bankruptcy court's limited role in ancillary proceedings—assisting

the foreign administration—is to apply the section 304 (c) standards, to enforce foreign orders that the issuing court could not enforce, to enjoin concurrent domestic actions, and, in the appropriate case, to impose additional requirements on the foreign proceeding to protect domestic claimants. *See* 11 U.S.C. § 304(b).

The Petitioner's suggestion that the Eleventh Circuit decision is contrary to the directions of this Court that "federal courts should scrupulously confine their own jurisdiction to the precise limits which have been defined by statute" (Petition at 16) is puzzling in light of the limited nature of ancillary proceedings and the existence of an express statute. In section 304 Congress expressly empowered bankruptcy courts to decide whether to recognize foreign proceedings in the face of concurrent state proceedings and, in section 304(c), provided them with standards to do so. To argue, as the Petitioner appears to, that the implementation of a uniform federal comity standard spelled out by Congress amounts to total usurpation of state court jurisdiction and so radically departs from recognized judicial practice as to warrant an exercise of this Court's supervisory power requires a gross distortion of the Eleventh Circuit's opinion and reflects a gross misunderstanding of the nature of section 304 proceedings.

The Petitioner's repetition of the district court's assertion that "[i]t seems unlikely that Congress would exclude American decedents' estates from the Bankruptcy Code but allow foreign decedents' estates to be protected" (Petition at 13) also reflects a misunderstanding of section 304 and of the Eleventh Circuit decision. In support of its decision below, the Eleventh Circuit wrote, "it bears emphasizing that a section 304 debtor does not receive the benefits of full bankruptcy administration under United States law." *In re Goerg*, 844 F.2d at 1568. The application of section 304 in this case will not give a foreign debtor a bankruptcy advantage over U.S. citi-

zens; indeed, failure to apply section 304 would waste judicial resources and give unfair advantage to certain foreign claimants by allowing those claimants to forum shop and to relitigate claims. Rather than giving foreign debtors a benefit denied U.S. citizens, section 304 merely provides a mechanism by which the benefits and burdens of the foreign debtor's own law may be enforced. It does not allow foreign debtors who would be ineligible for bankruptcy administration under U.S. law to somehow evade the burdens of U.S. law while obtaining the benefits.

B. The Eleventh Circuit's Decision Will Not Flood the Bankruptcy Courts with International Probate Matters Because It Does Not Hold that Every Foreign Decedent's Estate Is *Entitled* to Ancillary Assistance, But Merely that the Representative of a German Bankruptcy Estate Involving an Insolvent German Decedent's Estate Eligible for Bankruptcy Under German Law Meets the *Threshold Requirements for Requesting* Ancillary Assistance Under Section 304.

The Petitioner's final argument that the decision of the Eleventh Circuit opens the federal bankruptcy courts to all foreign decedents' estates regardless of whether they are insolvent again evidences his propensity for arguing that "the sky is falling." The Petitioner expresses concern that, after the decision of the Eleventh Circuit, the federal bankruptcy courts will be inundated with requests from representatives of foreign decedents' estates for administration of those estates. However, the Eleventh Circuit did not hold that section 304 relief is available to all foreign decedents' estates, and, as stated by the Petitioner himself, that court "presumed that section 304 was intended to apply only to foreign insolvency proceedings . . . ." Petition at 18. Like the Petitioner's other arguments, this argument addresses an issue that was not raised by the holding below, that is unlikely to arise, and that properly can be addressed by the

lower courts when and if it does arise. Accordingly, the concerns raised by the Petitioner simply do not merit action by this Court.

In the case that is before the Court, the Eleventh Circuit held merely that a German bankruptcy trustee for a German debtor eligible for bankruptcy administration in Germany but not in the United States passes the threshold eligibility requirement to request ancillary assistance. That Court did not reach the issue of whether a German probate administrator outside of German bankruptcy proceedings would pass those requirements. Neither did it address the scope of the ancillary assistance the foreign representative in this case might be entitled to receive. Section 304(c) specifies the factors that bankruptcy courts must consider in determining whether relief is appropriate, among them an examination of the law of the jurisdiction of the foreign proceeding, including issues such as who may be a debtor in that country and whether the proceeding is of the sort to which Congress intended to extend comity. The Eleventh Circuit construed only the portions of section 304 that set out eligibility requirements for filing a section 304 petition and expressly left open and remanded the issue of what relief is appropriate.

The Petitioner's argument that the bankruptcy courts will be inundated with probate matters depends upon a set of facts not before the Court and raises concerns about a highly speculative harm. It is unlikely that a representative of a solvent foreign decedent's estate that is not the subject of a foreign insolvency proceeding would request ancillary assistance from a U.S. bankruptcy court, and it is even more unlikely that a bankruptcy court would grant ancillary relief if such a case were presented. Further, it is still more unlikely that bankruptcy courts would establish a pattern of extending discretionary relief in such cases. Moreover, if the bankruptcy courts were to establish such a pattern, the district and

circuit courts would be the appropriate forums for initial review. Because the threat to judicial administration of the United States presented by the Petitioner is so speculative, further review of the Eleventh Circuit's decision is not called for.

III. BECAUSE THE ELEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS AND THE UNIFORMITY OF THE FEDERAL LAW IS NOT THREATENED, THIS COURT SHOULD NOT GRANT CERTIORARI.

An important function of the Supreme Court is to maintain uniformity in federal law by resolving conflicts among decisions of the federal appellate courts. The U.S. Courts of Appeals are courts of last resort in the absence of Supreme Court review. Without Supreme Court action to resolve conflicts among the circuit courts, federal uniformity could be lost. This Court, therefore, often grants certiorari to resolve conflicts among the federal courts of appeals. *See, e.g., Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456 (1967) (widespread conflict among the circuits existed); *Goldlawr, Inc. v. Herman*, 369 U.S. 463 (1962) (conflict between the Second Circuit and the D.C. Circuit).

In this case, however, no conflict threatens the uniformity of federal law, and there is no need for certiorari. No other courts of appeals have addressed the question whether a bankruptcy court has jurisdiction to entertain a section 304 proceeding involving an entity that does not qualify as a debtor under the U.S. Bankruptcy Code. Thus, the Eleventh Circuit's decision does not create a conflict among the circuits. Further, the Eleventh Circuit's opinion is consistent with the decisions of lower courts that have addressed issues similar to the issue raised in this case. These lower courts, in reasoned decisions, have similarly declined to impose

domestic eligibility requirements on foreign proceedings that were otherwise eligible for ancillary assistance. *See, e.g., In re Lines*, 81 B.R. 267 (Bankr. S.D.N.Y. 1988); *In re Culmer*, 25 B.R. 621 (Bankr. S.D.N.Y. 1982). There ancillary assistance was granted in foreign insurance company and bank liquidation proceedings although section 109(b)(3) of the Bankruptcy Code provides that insurance companies and banks cannot maintain Chapter 7 liquidation proceedings. The Eleventh Circuit reached no radical conclusions; it merely took a small step in the incremental process of interpreting a new statute. In short, the uniformity of federal law is not in danger, and Supreme Court action is not required.

The mere fact that a California bankruptcy court, prior to the Eleventh Circuit's decision, declined to grant a preliminary injunction because it erroneously found no "foreign proceeding" as defined in section 101(22) does not create a conflict requiring correction by the Supreme Court. *See In re Petition of Klaus Hubert Gorg* (sic), No. 3-86-0194OJR, slip op. (Bankr. N.D. Cal. August 15, 1986). The California bankruptcy court's opinion is unlikely to have any precedential effect. Its brief order was unreported, never appealed or affirmed, and contained no reasons for the decision. It, therefore, will not spawn a great deal of contrary law. Moreover, while it is the Supreme Court's function to maintain uniformity among the appellate courts, the appellate courts are charged with maintaining uniformity within their circuits and with supervising the district courts. *See* Stern, Gressman, and Shapiro, *Supreme Court Practice* 207 (6th ed. 1986). In time, the Ninth Circuit may issue an opinion in accordance with the Eleventh Circuit opinion, thus avoiding any conflict. When a conflict may be resolved by future appellate court decisions and a consensus may evolve without Supreme Court action, this Court should reserve its judicial resources and forebear from granting certiorari. *See* Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austl. L.J. 108 (1959).

Moreover, when the issue involved in a case is new and uncharted, judicial restraint ordinarily should be exercised and certiorari declined whether or not a conflict exists. Unlike cases involving recurring problems, where the consequences of a resolution may be anticipated, the ramifications of deciding a new issue are often unforeseeable. Experience with the conflicting law over time will illuminate the issues. *McCray v. New York*, 461 U.S. 961 (1983) (this Court refused to grant certiorari to consider the novel issue of the constitutionality of peremptory jury challenges). In *McCray*, Justice Stevens, writing for the Court, stated:

> I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date.
>
> * * * *
>
> In my judgment it is a sound exercise of discretion for the Court to allow the various states to serve as laboratories in which the issue receives further study before it is addressed by this Court.

Id. at 962-63.

Further experience in the lower courts with section 304 will likewise illuminate the intricacies of that section. Section 304 was enacted in 1978. It had no predecessor under prior law, and as yet few cases construing the section have been decided. Although Petitioner boldly asserts that the Eleventh Circuit's opinion in this case will force bankruptcy courts into the business of administering the estates of foreign decedents (Petition at 17), that argument is only a speculative overstatement, and nothing of the sort is likely to occur. *See supra* at II.B. Before this Court devotes further attention to this issue, the bankruptcy courts, under the capable supervision of the district and circuit courts, should be allowed to serve

as laboratories for the issue. Meanwhile, no risk will be incurred as a result of this Court's denial of review.

CONCLUSION

Section 304 provides for the enforcement in the United States of orders and judgments arising out of foreign insolvency proceedings. Congress's purpose in enacting section 304 was to create a uniform standard for recognizing and enforcing the decrees of foreign courts rendered in bankruptcy-like proceedings for the purpose of promoting the economical and expeditious administration of foreign estates owning property in this country. The Eleventh Circuit, after considering the language, structure, and legislative history of section 304, held that the judgments entered in foreign insolvency proceedings concerning insolvent decedents' estates are entitled to recognition according to the same standards as the judgments entered in other types of foreign insolvency proceedings.

Contrary to the Petitioner's argument, the decision of the Eleventh Circuit will not lead to the development of a federal common law of probate administration. Neither will it flood the bankruptcy courts with foreign probate cases. Indeed, the Eleventh Circuit's decision will have no discernible impact on judicial administration in the United States. The Petitioner's argument to the contrary is based on a gross misreading of the statute and of the Eleventh Circuit's decision and does not present any reason for this Court to exercise its supervisory power.

In addition, the Eleventh Circuit's interpretation of section 304 is not in conflict with the decision of any other circuit court of appeals. No other circuit has addressed this specific issue, and the few decisions that have been rendered under section 304 are consistent with the opinion of the Eleventh Circuit. Given that there is currently no realistic threat to the uniformity of federal

law and that the understanding of issues presented by section 304 will benefit by further study and discussion in the lower courts, certiorari in this case is both unnecessary and premature.

Respectfully submitted,

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APPENDICES

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APPENDIX A

Certified German-English Translation

71 N 641/85

AMTSGERICHT KOELN
COLOGNE LOCAL COURT
FEDERAL REPUBLIC OF GERMANY
(COURT OF FIRST INSTANCE HAVING JURISDICTION)

COURT ORDER

Re the estate of the late

Heinz Guenter Kaussen, M.B.A., deceased on April 14/15, 1985, last residence: Neusser Str. 30-32, 5000 Cologne 1, Federal Republic of Germany,

—Administrator: Hermann Haeck, CPA and Tax Consultant, M.B.A., address: Mariawaldstr. 9, 5000 Cologne 41, Federal Republic of Germany;

—Co-Administrator: Dr. Karl Heinz Maus, CPA and Tax Consultant, M.B.A., address: Bartmannstr. 32, 5020 Frechen, Federal Republic of Germany.

Upon petition of the Administrator, bankruptcy proceedings shall commence as of this date, January 24, 1986, 9 a.m. because the estate is over-indebted (Paragraph 215, Bankruptcy Act).

Dr. Klaus Hubert Goerg, Attorney at Law, Theodor-Heuss-Ring 62, 5000 Cologne 1, Federal Republic of Germany, Tel. 0221/120141, is herewith appointed as Trustee in Bankruptcy.

Claims against the decedent's bankrupt estate shall be filed with the Court by *March 5, 1986.*

A court order re: the retention of the appointed Trustee or the appointment of a new Trustee, the appointment of a committee of creditors, the sale of immovables by private sale, the deposit of money, securities and valuables and other items listed in Paragraphs 132, 134 and 137 of the Bankruptcy Law shall be passed

on *Friday, March 7, 1986, 10:30 a.m.*

The examination of the claims filed shall take place on

Wednesday, June 25, 1986, 10:00 a.m.

Place: Cologne Local Court, Reichenspergerplatz 1,
Ground Floor, Rm. 18,
Federal Republic of Germany.

Those in possession of any item of the decedent's bankrupt estate, or those owing the latter, shall not deliver or pay anything to the heiress, Mrs. Ingeborg Skowronek, M.B.A., Cologne, FRG, or to any other heirs recognized under the legal system of a foreign country, or to the Administrator. Such persons shall report the possession of any property as well as any claims, for which separate realization is sought, to the Trustee by

March 5, 1986.

The heiress, any heirs recognized under the legal system of a foreign country and their curators, and any persons authorized to administer and use the property in the Federal Republic of Germany and abroad, and any other persons authorized to dispose of the property shall report any and all property (things and rights) which was part of the estate on April 14/15, 1986, and any and all property subsequently added to the estate or removed from the estate to the Trustee. The heiress and any heirs of the late Heinz Guenter Kaussen, M.B.A., recognized under the legal system of a foreign country, or the curators representing them shall grant the Trustee all powers of attorney permitting him under the laws of the respec-

tive state of situs to take possession of the deceased's property located abroad and constituting part of the decedent's estate and to use such property to the benefit of the creditors in the Federal Republic of Germany and abroad.

Inasfar as succession by inheritance has occurred under the laws of this state or of a foreign state, the rights of the heiress, the heirs or an administrator to dispose of movables and immovables of the estate are no longer in effect due to the universal effect of the commencement of bankruptcy proceedings (BGHZ ((Federal Supreme Court of Justice For Civil Cases, a collection of published decisions)) 68, 16, 17; 88, 147, 150). The same applies to powers of attorney applicable to the sale or encumbrance of real property or property rights abroad or disposals of movables. Subject to the recognition by the respective foreign legal system, the bankruptcy sequestration shall also include the proceeds of property of the deceased located abroad which is part of the decedent's bankrupt estate, irrespective of whether any special administration with respect to the decedent's property located abroad has already been ordered in the foreign country under the laws of that respective country.

A mail, telephone and telegraph ban is herewith decreed. This ban shall not extend to communications by the courts, public prosecutor's offices or the Trustee's offices.

The members of the preliminary committee of creditors shall be:

1. Dr. Herbert Heidland, Attorney at Law, Antwerpener Str. 2, 5000 Cologne 1, FRG

2. Wolfgang Kellert, Bank Director, Schumannstr. 9, 5090 Leverkusen, FRG

3. Bayerische Hypotheken- und Wechsel-Bank Aktiengesellschaft, represented by Board members Dr. Hans

Fey and Dr. Klaus Geiger, Theatinerstr. 11, 8000 Munich 2, FRG.

Cologne, FRG, January 24, 1986

Local Court, Dept. 71
Dr. Uhlenbruck
Judge, Local Court
Executed by:
(Signed)
Court Clerk (Court Seal)

APPENDIX

The Hague Convention dated October 5, 1961

1. Country: Federal Republic of Germany

   This official document

2. is signed by
   Ms. Iske

3. in her capacity as
   Court Clerk.

4. It bears the stamp of the Cologne Local Court No. 638
   Certified

5. in Cologne, FRG,

6. on January 31, 1986

7. by the Vice President of the Landgericht (Regional Court)

8. No. 910 E-249.

9. (Seal)

10. Signature (Signed) Schmitz

* * * *

Certified to be a faithful and complete translation of the German text.

June 15, 1986

/s/ Anne E. Harland
ANNE E. HARLAND
Translator/Interpreter
Accredited by U.S. Dept. of State
733 Courtenay Dr. NE
Atlanta, GA 30306

APPENDIX B

Certified German-English Translation

19 T 58/86

COLOGNE REGIONAL COURT
(LANDGERICHT KOELN)

FEDERAL REPUBLIC OF GERMANY

DECREE

In the bankruptcy proceedings

re the estate of the late H.G. Kaussen, M.B.A., last place of residence: 5000 Cologne 1, Neusser Strasse 30-32, FRG,

Trustee in Bankruptcy: Dr. K.H. Goerg, Attorney at Law, Cologne,

to which Mrs. Ingeborg Skowronek, 5000 Cologne 1, Neusser Strasse 30-32, FRG, is a party, as Heiress and Appellant,

Counsel: Dr. Hartstang and Partners, 4300 Essen 1, Zeunerstrasse 32, and Koch II and Partners, Cologne, FRG,

on February 17, 1986, the 19th Division for Civil Matters of the Cologne Regional Court held and ruled as follows on the special appeal (filed within a certain time limit) by the heiress filed on February 5 and 7, 1986, respectively, of the decree of the Cologne Local Court dated 1-24-86, file #71 N 641/85, served upon the heiress on January 28, 1986:

1. The appeal is dismissed at the cost of the heiress.

2. Due to obvious incompleteness, the decree of the Division dated January 9, 1986, file # 19 T 8/86, shall be corrected to the effect that the heiress shall bear the costs of the appeal proceedings 19 T 8/86.

Grounds for the Decision:

The special appeal which was filed in due form and time had to be dismissed, with cost consequences in accordance with § 97, German Code of Civil Procedure (ZPO). It is not justified by the facts. The Bankruptcy Court rightly commenced bankruptcy proceedings of the decedent's estate under § 215 and following of the Bankruptcy Act (KO). The fact of the matter is, documented by the appraisals submitted, that the estate is over-indebted.

The appeal of the decree to commence bankruptcy proceedings is dismissed.

The administrator had filed a petition in accordance with the provisions of § 1980 and 1985, German Civil Code (BGB). Administrator Haeck filed this petition with the Court Clerk's office on 11-13-85.

Co-administrator Dr. Maus' participation in filing a petition in bankruptcy was not required for it to be effective. The position of a co-administrator is purposely not mentioned in the provisions of § 1960 and following of the German Civil Code (BGB). Occasionally, in cases involving large or complex estates, a co-administrator is appointed much like a controlling guardian under § 1799 and following, German Civil Code, as a type of controlling body having enumerative functions of approval (compare § 1809-1816, 1818-1824, German Civil Code). The above-mentioned cases of approval in the law concerning wards cannot be applied to estates ipso iure. As in the estate law one or several such provisions are lacking, the duties of the co-administrator can be understood only in such a way that he has certain controlling and cooperative functions, without having authority to make independent decisions. Naturally he can, if he disapproves of the management of the administrator, turn to the Probate Court in order to have orders issued to the administrator.

Due to the consequences as to liability and criminal law of an omission of filing, he is unable to keep the administrator from filing when an act of bankruptcy exists. The legal position could be evaluated differently only if several administrators had been appointed as equal administrators (also see Jaeger/Weber § 217-220, Bankruptcy Act, marginal note 10).

In essence, however, the issue of whether a joint filing is necessary is irrelevant, because co-administrator Dr. Maus and Mr. Haeck, C.P.A., appeared before the Court Clerk of the Local Court and declared that bankruptcy proceedings had to be commenced. The fact that the petition in bankruptcy was not recorded by Dr. Maus, is irrelevant under the law, because Dr. Maus expressly agreed with the petition, not only the same day, but also at later dates.

As the negative function of the controlling guardian is limited to denying approval of legal transactions of the guardian requiring approval, nothing more can be required from the co-administrator. However, as Dr. Maus has granted his approval of the petition for bankruptcy of the administrator, the effectiveness of this petition is unchallenged.

The notification of a defect by the heiress, i.e., that she had not been granted sufficient right to be heard, lacks any factual basis.

The Division concurs with the Bankruptcy Court that due process of law must be granted in bankruptcy proceedings as well (see H.J. Maintzer, "Granting of Due Process in Bankruptcy Proceedings," KTS 1985, 617 and following). According to the general opinion reflected in the literature and consistent court rulings, bankruptcy commencement proceedings are summary (expedited) proceedings which do not tolerate suspension or deferment (exception: § 46, Composition Rules (Vg10)). The debtor or any other third party is not entitled to receive due process of law

prior to every decision concluding the proceedings (also see Maintzer, KTS 1985, p 623).

The urgency of any bankruptcy proceedings has the necessary consequence that any involved party, after having been notified of the petition for bankruptcy, must, at any subsequent point in time, practically count on the commencement of the bankruptcy proceedings or the rejection of commencement due to a lack of bankrupt's assets (Maintzer, as cited).

A further consideration is that the acts by judges performed in the course of the bankruptcy commencement proceedings only serve the purpose of securing the potential bankrupt estate and determining its value as the basis for decision under the bankruptcy law. For those parties to the petition proceedings involved even in the remotest sense have no further control over its continuation—at least not in the sense, as is the case in a standard law suit, that they could influence the proceedings in a formative, expediting and delaying manner. Thus, their claim to be granted due process of law is reduced, which is to be subordinated to the specific requirements of these global and expedited enforcement proceedings.

This issue, however, need not be dealt with in further detail at this point:

In the case at hand, the heiress was granted ample opportunity to comment on the sequestration report. The opportunity for comment already existed on the basis of an appraisal (expert opinion) prepared by co-administrator Dr. Maus on October 1, 1985. In this appraisal, which constitutes part of the estate files, Dr. Maus arrived at an over-debtedness in the amount of DM 19,962,090.00. Dr. Maus used the same basis of valuation in this appraisal as the sequestrator at a later date. The consequences of such appraisal, including those with respect to the duties with respect to the petition for bankruptcy proceedings, had to be known to the heiress

and her counsel. There would have been ample opportunity to comment on the findings arrived at by Dr. Maus prior to the petition for bankruptcy filed by Mr. Haeck, CPA. It is thus determined that on the basis of Dr. Maus' appraisal, the parties involved in the proceedings were aware of the fact of the alleged over-indebtedness since October, 1985.

Even immediately prior to the issue of the appealed decree, the heiress was not entitled to be heard further. The contents of the files and the numerous and detailed briefs of the heiress contained therein demonstrate very clearly that the heiress was granted the right to be heard and was, in fact, granted it quite generously. Upon her request the heiress was informed that in order to check the basis for valuation used in the appraisals solicited to date, a further appraiser had been appointed by the Bankruptcy Court ex officio in order to make absolutely sure that no mistake was contained in the appraisals prepared up to that date by experts Dr. Goerg and Dr. Maus, and if so, to define it. Therefore the heiress was indeed sufficiently informed. Due to the urgency of the decree which had to be issued by the Bankruptcy Court, she should have and must have expected the decision following the receipt of the Weyers appraisal. What is more, the bankruptcy judge expressly pointed this very consequence out to one of the heiress' counsel in a meeting on 1-15-86, as is reflected in a memo dated 1-24-86. One can hardly imagine that the Appellant could have been granted more due process of law than was granted in this specific case.

Finally, a further delay of the decision on the commencement of bankruptcy proceedings by having granted further rights to be heard was not justified because of the inevitable decline in value of the estate which was addressed in the Weyers appraisal.

One of the reasons why this is justified is the fact that the heiress is not entitled to the right to petition for

bankruptcy, her being only an indirect party to the commencement of bankruptcy proceedings. The issue of whether the heirs were entitled at all to be heard in the course of the commencement of bankruptcy proceedings on the estate upon petition of the administrator or curator was rightfully left open. In any case, the due process granted thus far appears sufficient to adequately safeguard the interests of the sole heiress with respect to the assets in the FRG and abroad. Her claim to be heard can definitely not justify the commencement of the proceedings, which is economically imperative, being delayed even further, e.g., because of a splitting up of the estate into domestic and foreign property. The appraisal submitted by Prof. Sandrock shows that under international private law the heiress can freely dispose of foreign assets to a large degree. It is in the urgent interest of the creditors in implementing liability to terminate the splitting of the estate created by the international private law and to achieve uniform coverage of the bankrupt's estate because of the existing over-indebtedness. This interest takes absolute priority over the personal interest of the heiress in being able to dispose of the foreign assets. The law has provided the administrator with sole authority and responsibility with respect to his duty to petition bankruptcy proceedings. The administrator is not obligated either to grant due process to the heirs prior to his petition for bankruptcy proceedings. If the heir or heirs received more than adequate due process, thus having the opportunity to prevent the decision on a petition for bankruptcy proceedings duly issued by the administrator and co-administrator by means of constant appeals, the duty of the administrator to file such petition as an independent legal duty would in effect be totally invalidated. The heiress had the opportunity at all times to appeal the petition for bankruptcy proceedings by Mr. Haeck, CPA, by filing for his termination with the Probate Court, for example. If the petition for bank-

ruptcy proceedings was filed despite a lack of cause for opening bankruptcy proceedings, for which Administrator Haeck was responsible, this is solely an issue of the administrator's liability. In terms of the commencement of bankruptcy proceedings, it is not the heiress who is a party, but the administrator. It was he who claimed the existence of over-indebtedness of the estate when submitting his petition and proved this upon the court's request by corresponding documentation. Its accuracy, in turn, has been confirmed by the appraisals of the experts.

While the heiress in her notice of appeal makes reference—very carefully at this time—to the non-existence of estate over-indebtedness, which is required for commencement of bankruptcy proceedings under the law, this is not applicable according to the appraisals of Dr. Goerg, Dr. Maus, and Weyers. We refer to these appraisals. They are known to the heiress. Certain valuation criteria used by the appraisers can, in fact, be seen more critical. However, this does not change the fact which exists beyond any doubt on the basis of the three appraisals and to the satisfaction of this court that the estate is over-indebted. This Division of the Court, in fact, harbors the general fear—beyond the valuation used by the appraisers—that the appraisers used valuation standards based on the assumption of normal economic conditions on the real estate market. If, however, this real property must be utilized in order to realize the value it represents in order to cover the debts, this will mean a flood of additional real property on a market that has already been over-saturated in recent years, which, in turn, is bound to result in drastic price reductions specifically of the type of real property that represents the major value of the estate. This expectation is by no means utopic. Even at this time, numerous letters of interested parties which are contained in the files demonstrate that real estate brokers, purchasers and speculators count on acquiring real property at low prices in connection with the rumors

of estate bankruptcy proceedings or knowing that such proceedings have been commenced.

Furthermore, the considerations of the heiress with respect to the value and non-overindebtedness of the estate have partially lost their basis because of the Weyers appraisal. As mentioned above, the appraisal was solicited in order to enable the bankruptcy court to satisfy itself that the valuation basis submitted by Dr. Maus and Dr. Goerg contained no errors or was at least justifiable. On the basis of the convincing Weyers appraisal, the bankruptcy court determined that any valuation basis applied by the parties in these proceedings in evaluating the domestic real property was bound to result in overindebtedness. Furthermore, the amount of the debts of the estate will increase by at least another DM 25 million because of the probable commencement of bankruptcy proceedings with respect to the Westaufbau assets. Due to the delay in the commencement of bankruptcy proceedings, further losses have been incurred by the estate in the meantime, particularly in view of the constant increase in liabilities. The creditors of the estate are entitled to the bankruptcy court's ensuring that a further decline in value of the available assets is avoided by taking suitable measures and dealing with the proceedings expeditiously.

The problem of which items of the estate are part of the bankrupt estate and which are not, is entirely irrelevant with respect to the commencement of bankruptcy proceedings, i.e., whether, in the opinion of the heiress, this issue is based on the principle of territoriality, or on the principle of universality.

On page 5 of her appeal, the heiress raises the question whether the bankruptcy judge had ". . . jurisdiction at all, and if so, to what extent, to rule as reflected in the decree of 1-24-86." This question has been duly and clearly answered above: The estate is in fact over-

indebted; the administrator in fact filed a petition for bankruptcy; therefore, the bankruptcy court had to commence bankruptcy proceedings, independent of any further considerations by the heiress.

The further questions as to what authority the trustee in bankruptcy and what duties the heiress have with respect to the foreign assets, refer—if at all—to the implementation of the estate bankruptcy proceedings, the opportunities of incorporating further items of the estate in the bankrupt estate, and to the duties of cooperation of the heiress in this effort. They do not relate, however, to the preceding act of commencement of bankruptcy proceedings. As a result, they are of no significance to the decision of this issue.

As the decision of the Division of the Court dated 1-9-86, file # 19 T 8/86 does not contain a decision as to costs, in deviation from the reasons given therefor, it had to be corrected officially by corresponding application of § 319, German Code of Civil Procedure (ZPO).

In accordance with the statements made in the decision dated 1-9-86, no amount in controversy can be determined for the appeal at this time.

Neumann Boenicke-Dierdorf Mueller

Executed: (Signed) Court Clerk (Seal of the Cologne Regional Court)

* * * *

Certified to be a faithful and complete translation of the German text.

6-15-86

/s/ Anne E. Harland
ANNE E. HARLAND
Translator/Interpreter
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733 Courtenay Dr. NE
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APPENDIX C

Certified German-English Translation

COLOGNE HIGHER REGIONAL COURT
((OBERLANDESGERICHT KOELN))

Federal Republic of Germany

DECREE

2 W 34/86
19 T 58/86 Cologne Regional Court
71 N 641/85 Cologne Local Court

In the bankruptcy proceedings

re the estate of the late H.G. Kaussen, M.B.A., last place of residence: Neusser Strasse 30-32, 5000 Cologne 1, Federal Republic of Germany,

Trustee in Bankruptcy: Dr. K.H. Goreg, Cologne,

party to the proceedings:

Mrs. Ingeborg Skowronek, Neusser Strauss 30-32, 5000 Cologne 1, FRG,

as Heiress and Appellant,

Counsel: Dr. Hartstang and Partners, Attorneys at Law, Zeunerstrasse 32, 4300 Essen 1, FRG,

the 2nd Division for Civil Matters of the Cologne Higher Regional Court, by Judges Dr. Schmitz, Dr. Schneider and Dr. Pretzell, upon the special further appeal (subject to a time limit) by the Appellant of February 20, 1986, from the decree issued by the 19th Division for Civil Matters of the Cologne Regional Court dated February 17, 1986, which appeal was filed with this Court on February 21, 1986, has on March 3, 1986, decreed and held as follows:

I. The special further appeal shall be dismissed as inadmissible to the extent that it is directed against the following:

1. the decision by the Cologne Local Court re the commencement of the bankruptcy proceedings on the estate;

2. the court orders of the Local Court;

   a. with respect to the Appellant's duty to provide information;

   b. with respect to the reference by the Local Court to the legal consequences of commencement of the bankruptcy proceedings;

   c. with respect to the reference by the Local Court to the legal consequences of bankruptcy sequestration for the use of foreign assets which are part of the bankrupt estate.

II. Re the special further appeal from the following court orders:

1. the Appellant's obligation to grant power-of-attorney;

2. the expiration of existing powers of attorney;

3. the postal, telephone and telegraph ban, a decision will be issued by the 2nd Division for Civil Matters in its final decision.

Grounds:

I.

By decree of January 24, 1986, the Cologne Local Court commenced bankruptcy proceedings on the estate of Heinz Guenter Kaussen, deceased in April of 1985, and appointed Dr. Goerg, Attorney at Law, Cologne, as the Trustee in Bankruptcy. The decree contains court orders as follows:

1. Those in possession of any item of the decedent's bankrupt estate, or those owing the latter, shall not de-

liver or pay anything to the heiress, Mrs. Ingeborg Skowronek, M.B.A., Cologne, FRG, or to any other heirs recognized under the legal system of a foreign country, or to the Administrator. Such persons shall report to the Trustee in Bankruptcy the possession of any property as well as any claims, for which separate realization is sought by secured creditors, by March 5, 1986.

2. The heiress, any heirs recognized under the legal system of a foreign country and their curators, and any person authorized to administer and use the property in the Federal Republic of Germany and abroad, and any other person authorized to dispose of the property shall report any property (things and rights) which was part of the estate on April 14/15, 1985, and any property subsequently added to the estate or removed from the estate, to the Trustee in Bankruptcy.

3. The heiress and any heirs of the late Heinz Guenter Kaussen, M.B.A., recognized under the legal system of a foreign country, or the curators representing them shall specifically grant the Trustee in Bankruptcy all powers of attorney permitting him to take possession of the deceased's property located abroad, constituting part of the decedent's estate under the laws of the respective state of situs and to use such property to the benefit of the creditors in the Federal Republic of Germany and abroad.

4. Inasfar as succession by inheritance has occurred under the laws of this state or of a foreign state, the rights of the heiress, the heirs or an administrator to dispose of movables and immovables of the estate are no longer in effect due to the universal effect of the commencement of bankruptcy proceedings (BGHZ (Federal Supreme Court of Justice for Civil Cases, a collection of published decisions) 68, 16, 17, 88; 147, 150). The same applies to powers of attorney applicable to the sale or encumbrance of real property or property rights abroad or disposals of movables. Subject to the recognition by the respective foreign legal system, the bankruptcy se-

questration shall also include the use and the proceeds derived from the decedent's property located abroad which is part of the decedent's bankrupt estate, irrespective of whether any special administration with respect to the decedent's property located abroad has already been decreed in the foreign country under the laws of that respective country.

5. A mail, telephone and telegraph ban is ordered. This ban shall not extend to communications by the courts, public prosecutor's offices or the Trustee's offices.

The heiress of the decedent, represented by Attorney-at-Law Koch, Cologne, filed a special appeal from this decree on February 5, 1986, on the grounds that proof for the over-indebtedness of the estate had not been furnished.

Represented by Dr. Hartstang and Dr. Grote, Essen-Bredeney, Attorneys at Law, the Appellant filed a second special appeal, which was received on February 5, 1986, petitioning that:

"the decree appealed be amended and reversed, or that alternatively, the decree be partially amended and reversed in accordance with the law."

The Appellant cited the following grounds for this second appeal:

That the decree of the Cologne Local Court is based on a violation of the right to be heard because the Appellant had not been informed of a comment made by the present Trustee.

That she had further been denied an opportunity to have the appraisal by Mr. Weyers, Department Chief, dated January 24, 1986 explained verbally. In view of the contents of the appraisal, the Appellant claims, this was imperative.

The court orders issued by the Local Court, she further claims, are not confirmed by law nor by any supreme

court precedents and contains errors of law. An appeal, the Appellant claims, must clarify specifically:

1. what authority the Trustee has with respect to the foreign assets;

2. what duties the Appellant has with respect to the foreign assets; and

3. whether the bankruptcy judge had jurisdiction at all and if so, to what extent?

For the legal claims made by the Appellant, we refer to the grounds stated in the brief dated 2-3-86, pages 5 to 21, sheet 853 through 869 of the files.

By decree of February 17, 1986, the Cologne Regional Court dismissed the special appeal and decreed under subpara. 2 of the operative provisions:

"The appeal is dismissed, with the heiress bearing the costs therefor. The decree of the Division dated 1-9-86, file # 19 T 8/86, is corrected due to obvious incompleteness to the effect that the heiress shall bear the costs of the appeal proceedings 19 T 8/86."

The Regional Court stated as follows:

"As, deviating from the grounds stated, the decree issued by the Division dated 1-9-86, file # 19 T 8/86, does not contain a decision as to costs, it had to be corrected officially based upon an analogous application of § 319, German Code of Civil Procedure (ZPO).

On the merits, the Division addressed in detail the appeal from the commencement of the estate bankruptcy proceedings and the violation of the right to be heard under "Grounds for the Decision." Re appeal of the court orders (concerning the commencement of the bankruptcy proceedings), the Regional Court held as follows:

"The further issues as to the authority of the Trustee and the duties of the heiress with respect to the foreign

assets refer to, if applicable at all, the implementation of the estate bankruptcy, the opportunity to include further estate items into the bankrupt estate and the cooperative duties of the heiress in this effort. However, they do not refer to the act of commencement of bankruptcy proceedings which was precedent in time. As a result, they are not relevant for the decision of this issue."

The Appellant appealed the decree issued by the Regional Court by means of a special further appeal and filed a petition to the effect that:

the decree appealed be dismissed and amended and at the same time the decree of the Cologne Local Court dated 1-24-86 (71 N 641/85) be dismissed and amended;

alternatively, the above-referenced decrees be dismissed partially and amended in accordance with the law.

The admissibility of the special further appeal was addressed by the Appellant who stated that the appealed decree was based on grave procedural irregularities in that:

a. in the operative part of the ruling, "two" proceedings had been mingled and decreed upon, which was inadmissible, and that

b. no decision had been made on the alternate petition of the Appellant; the petition to revoke the court orders contained in the decree of the Local Court dated 1-24-86 had not been decided upon.

For details, we refer to the "grounds for the further special appeal," page 5 and following = 960 and following of the files.

II.

The further special appeal is partially inadmissible; other than that, the time for its decision is premature. Therefore, a partial advance decision must be made in

accordance with the provision of § 301, German Code of Civil Procedure (ZPO), applicable analogously with the appeal proceedings (see Zoeller/Schneider, ZPO, 14th volume, 1984, § 575, marginal note 8). Inasfar as the appeal is admissible, the time for the decision is not ripe because the Trustee must be heard prior to the Division for Civil Matters of the Higher Regional Court taking a decision (Art. 103, paragraph 1, German Basic Law).

1. The Local Court and the Regional Court have arrived at the same results, as demonstrated by the wording of their decrees, so that a new, independent reason for appeal in terms of § 568, paragraph 2, German Code of Civil Procedure, is lacking.

2. Beyond the wording of § 568, subpara. 2 of the German Code of Civil Procedure, case law provides for the admissibility of a further appeal even in the event of concurrent prior decisions, if the appealed decision is based on a grave procedural irregularity (general opinion, confirmed by BVerfGE (Highest Federal Constitutional Court) 49, 255, 256). The appeal of the Appellant on this issue is partially founded.

a. No procedural violation exists in that the Regional Court connected two independent decisions in an outwardly uniform decree. No provision exists in the appeal law and in the general legal principles of proceedings under which this is a violation of the procedural rules. On the contrary, such practice is fairly widely used. It is generally accepted in contentious proceedings, for instance, to issue a decision on the main issue and the amount in controversy for reimbursement of legal fees jointly, with the consequence that the decision concerning the main issue must be appealed based on regular appeal proceedings, whereas the determination of the amount in controversy contained in the very same document must be appealed based upon an appeal proceeding especially provided for. Furthermore, the decision of the Regional Court to commence bankruptcy proceedings

with respect to the estate cannot be based on the lack of a cost decision, which was an oversight, being rectified in another decision.

For clarity's sake, the Division for Civil Matters of this Court has issued a separate decision on the special corrective appeal, i.e., in the court order proceedings 2 W 43/86, decree dated March 3, 1986.

b)

The appeal of the Appellant to the effect that the Regional Court did not decide on the court orders contained in the decree of the Local Court of 1-24-86, is founded. Whether the Division might have missed the petition of the special appeal or whether it might have considered a decision thereon non-essential, cannot be reliably concluded from the grounds for the decision. However, this is of no relevance. The decisive issue is that to the above extent, a decision which was petitioned for and required, was not made. This omission represents a violation of the procedures in that it violates Art. 103, subpara. 1 of the Basic Constitutional Law.

3.

This violation of the procedural rules by the regional court does not mean, however, that the special further appeal is admissible in its entirety. It is admissible only to the extent that the appealed decree can be based on this procedural defect.

a.

The prerequisite for admissibility of any redress is a grievance (see Zoeller/Schneider, German Code of Civil Procedure, marginal note 8 preceding § 511). The exceptional provision § 568, para. 2 of the German Civil Code is applicable to the procedure of a further appeal. In accordance therewith, not every grievance is sufficient to satisfy the redress requirements, but it must be a grievance arising in the second instance, forming the so-

called "new ground for appeal." However, in this respect, too, the procedural principle prevails that the admissibility of a redress is given only to the extent that the appellant has a grievance and wishes to eliminate the latter. For any prior decisions diverting therefrom in the operative part of the decision, this means that a partial appeal, even in application of § 568, subpara. 2 of the German Code of Civil Procedure, results only in a corresponding partial admissibility of the further complaint (see Zoeller/Schneider, German Code of Civil Procedure, § 568, marginal note 15). This limitation also applies inasfar as the law admits the further appeal due to a material procedural defect in the prior instance. To this extent the basic idea of § 568, subpara. 2, German Code of Civil Procedure, and the procedural principle of grievance as a prerequisite for redress must be complied with. The admissibility of the further appeal in the light of concurring prior decisions with grave procedural defects therefore applies only to the extent that the procedural defect could have affected the appealed decision. This qualification is expressed in that only those grave procedural defects will open the further appeal on which the appealed decision can be "based" (see Zoeller/Schneider, ZPO, § 568, marginal note 23).

b) The disregard of the first special appeal by the Appellant with respect to the court orders challenged by her contained in the decree of the Local Court dated January 24, 1986, can be of causal significance for those court orders only that remained undecided. The decision to commence bankruptcy proceedings is simply independent of whether the further court orders of the Local Court are founded or not. In no event can the commencement decision by the Local Court be based on the omission of a decision, whether the further court orders of the Local Court are founded or not. Therefore, a grievance of the Appellant based upon an alleged grave procedural defect is missing. This is the reason why the

further special appeal must be dismissed as inadmissible under § 568, subpara. 2, ZPO.

c.

Other procedural defects with reference to the decision to commence bankruptcy proceedings cannot be found in the files. In this context the Local Court did not overlook any petitions or statements.

d.

The further special appeal is partially inadmissible because of the court orders not decided on, as listed in the reasons for the appeal dated 2-20-86 on page 5 and following = Sheet 960 and following of the files.

aa. The reference of the Local Court to the duty to provide information on the part of the heirs of the decedent only reflects the provisions of § 100, Bankruptcy Act (KO) so that the procedural defect by the Landgericht cannot aggrieve the Appellant.

bb. The order issued to the Appellant to grant power of attorney substantiates a grievance. To this extent the further special appeal is admissible. Whether it is founded, will have to be decided in the concluding decision by the Division for Civil Matters of this Court after the Trustee has had an opportunity to comment.

cc. The statement made by the Local Court to the effect that the authority of the decedent's heirs to dispose had expired as of the effective date of the commencement of bankruptcy proceedings, reflects the provision of the law, i.e., only contains a correct instruction (§ 6, KO). To the extent that any rights of foreign heirs might be affected, this does not affect the Appellant, and she is lacking grievance.

dd. The reference to the expiration of powers of attorney with respect to the sale of encumbrance of foreign real property rights, may require re-examination; the

Division will therefore issue a decision thereon in its concluding decision.

ee. The reference to the bankruptcy sequestration also extending to the use and the proceeds of property located abroad reflects a legal consequence and does not constitute a grievance.

ff.

The substantiation of the decision on a mail, telephone and telegraph ban shall be ruled on in the concluding decision.

4.

The decision as to costs and the amount in controversy of the appeal shall be subject to the final decision.

Dr. Schmitz Dr. Pretzell Dr. Schneider

(Court Seal) Executed: Signed (Court Clerk)

* * * *

Certified to be a faithful and complete translation of the German text.

June 15, 1986

/s/ Anne E. Harland
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Translator/Interpreter
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APPENDIX D

Certified German-English Translation

OBERLANDESGERICHT KOELN
COLOGNE HIGHER REGIONAL COURT
FEDERAL REPUBLIC OF GERMANY
COURT OF APPEAL

DECREE

File No. 2 W 34/86
19 T 58/86 LG Koeln (Cologne Regional Court)
71 N 641/85 AG Koeln (Cologne Local Court)

In the bankruptcy proceedings

re the estate of the late H.G. Kaussen, M.B.A., last place of residence: Neusser Strasse 30-32, 5000 Cologne 1, Federal Republic of Germany,

—Trustee in bankruptcy: Dr. K.H. Goerg, Attorney at Law, Cologne, FRG,

involving

Mrs. Ingeborg Skowronek, Neusser Strasse 30-32, 5000 Cologne 1, FRG,

as Heiress and Appellant,

Counsel for the Appellant:

Dr. Hartstang and colleagues, Attorneys at Law, Zeunerstrasse 32, 4300 Essen 1, FRG,

the 2nd Division for Civil Matters of the Cologne Higher Regional Court, by Higher Regional Court Judges Dr. Schmitz, Dr. Schneider and Dr. Kuhne, has on April 28, 1986, upon the special further appeal (subject to a time limit) of the Appellant dated February 20, 1986, filed with the Court of February 21, 1986, against the decision of the 19th Division of Civil Matters of the Cologne

Regional Court dated February 17, 1986, held and decreed as follows:

1. Unless it has already been dismissed by the decision of the Division of Civil Matters of March 3, 1986, the special further appeal shall be dismissed on its merits.

2. The costs of the further appeal proceedings shall be borne by the Appellant.

3. For purposes of a preliminary cost calculation and subject to correction in the course of the proceedings, the amount in controversy of the appeal shall be set at DM (German Marks) 5 million.

Reasons for the Decision

I. By decree of the Cologne Local Court dated January 24, 1986, the bankruptcy proceedings re the estate of the late Heinz Guenter Kaussen, M.B.A., deceased in April 1985, were commenced and court orders given. In its decree of March 3, 1986, the Division of Civil Matters already partially decided on the appeals filed against the latter. For details, please refer to said decision.

The Appellant was given an opportunity to answer the pleading of the Trustee in Bankruptcy of April 7, 1986. Said pleading was sent to her counsel on April 11, 1986. No answer thereto was filed by the date of the decree of the Division of Civil Matters.

II. The legitimacy of the following orders is now up for decision:

—Duty of the Appellant to grant powers of attorney with respect to the property located abroad;

—Expiration of existing powers of attorney;

—Ban on mail, telephone and telegraph communications.

To the above extent, the special further appeal is dismissed on its merits.

1. The Division of Civil Matters agrees with the opinion of the previous instances that the Appellant has the duty to grant the Trustee power of attorney with respect to the real property of the late H.G. Kaussen, M.B.A., located abroad.

The dispute as to whether the so-called principle of territoriality or the so-called principle of universality shall prevail in the bankruptcy proceedings, i.e., whether the bankruptcy commenced in the Federal Republic encompasses the entire property of the Debtor—irrespective of its situs—, was in recent rulings of the Federal Court of Justice ruled on in favor of the principle of universality, which the Division of Civil Matters of this Court agrees with (BGHZ 68, 16; further references in Kuhn/Uhlenbruck/Lueer, Bankruptcy Act, 10th Volume, 1986, Paragraphs 237, 238 Rn. (marginal number) 17, and BGH (Federal Court of Justice), EWiR, Paragraph 237, Bankruptcy Act 1/85, 605 (Merz) = ZIP, 1985, 944). This means:

In addition to the domestic property, the Debtor's bankrupt estate shall further include the Debtor's property located abroad. The latter, too, shall be placed in custody and used by the Trustee (BGHZ 68, 17). Any duties of the Debtor in handling the bankruptcy proceedings shall therefore also include the property located abroad.

In administering and using the bankrupt estate, the Debtor is subject to a large number of cooperative duties. He shall do everything required in order for the Trustee to fulfill his duties under Paragraph 117, subpara. 1 of the Bankruptcy Act. He shall inform the Administrator, the committee of creditors and, upon the court's order, the creditors' meeting of all circumstances concerning the proceedings (Paragraph 100, Bankruptcy Act), and he shall be responsible, unlike the several debtor in an execution (a foreclosure), not only for tolerating the foreclosure of his property, but for the active surrender of the

bankrupt estate. Paragraph 117 of the Bankruptcy Act provides for a claim of surrender by the Trustee against the Debtor and obligates the latter to initiate any action required for the Trustee to fulfill his duty of taking possession of the bankrupt estate (Boehle-Stamschraeder/Kilger, Commentary on Bankruptcy Act, 14th volume, Paragraph 117, marginal no. 2; Jaeger-Weber, commentary on Bankruptcy Act, 8th volume, Paragraph 117, marginal no. 6 and following; and Hanisch in ZIP, 1980, p 170 and following). Accordingly, the foreclosure against the Debtor on the basis of the decree to commence bankruptcy proceedings is a surrender foreclosure in terms of Paragraphs 883 and following, Code of Civil Procedure (ZPO) (Jaeger-Weber as cited, marginal no. 13, with further references). This means imperatively that the Debtor is also obligated to enable or facilitate the Trustee's duty to fulfill his responsibilities under Paragraph 117, subpara. 1, Bankruptcy Act, by granting powers of attorney. As the Trustee has the duty, however, to use the Debtor's property located abroad, the further conclusion is imperative that the Debtor has the duty to grant powers of attorney accordingly. This appears to be the unanimous opinion of the literature (see documentation by Kuhn/Uhlenbruck, Bankruptcy Act, Paragraph 117, marg. no. 13a, and Kuhn/Uhlenbruck/Lueer as cited, Paragraph 237 and 238, marg. no. 65).

To the extent ascertainable, only the Koblenz Higher Regional Court has a legal opinion contrary thereto (KTS 1980, 68). The Koblenz Higher Regional Court also assumes that the Debtor's property located abroad is part of the bankrupt estate and that the Debtor's duty to provide information under Paragraph 110, Bankruptcy Act, extends to the Debtor's property located abroad. In the opinion of the Koblenz Higher Regional Court, however, a provision is lacking which would obligate the Debtor to grant power of attorney beyond the duty to provide information. In view of the comprehensive duty of the Debtor to cooperate, however, such a specific provision is

not required so that because of its lack, one cannot conclude that the Debtor is not obligated to grant power of attorney. In fact, the reverse is true. Particularly in view of the difficulties in practice which the use of the property located abroad presents (also see BGHZ 68, 17/18; Kuhn/Uhlenbruck/Lueer, Bankruptcy Act, Paragraphs 237, 238, marg. no. 7 and following) and which the Trustee may be confronted with, the basic duty of the Debtor to cooperate comes to bear. It is beyond any doubt that the granting of a power of attorney to the Trustee for the disposition of property located abroad represents a considerable facilitation in his compliance with his duties under Paragraph 117, subpara. 1, Bankruptcy Act.

The fact that the Trustee already has the right of administration and disposition of the bankrupt estate by virtue of the law (Paragraph 6 of the Bankruptcy Act) and such right extends to property located abroad, does not contradict the above. As the principle of universality is not recognized by all states, the Debtor cannot invoke that the granting of a specific power of attorney is unnecessary under German law. The actual circumstances encountered by the Trustee determine the extent to which the Debtor has the duty to cooperate in order to enforce claims for obtaining and using property located abroad covered by the bankruptcy proceedings. If the presentation of the adjudication order does not suffice for evidence of authority of the Trustee, then the Debtor must take all necessary steps of his own so that the intent of Paragraph 6 of the Bankruptcy Act becomes effective abroad as well.

2. A further legal consequence is derived from the above in that the rights of the heiress or any other person authorized to dispose of the property constituting part of the estate has expired, which includes the property located abroad.

3. The ban on mail, telephone and telegraph communications ordered by the Local Court is provided by Para-

graph 121, Bankruptcy Act. No considerable legal concerns with respect to this order are apparent.

4. The decision re costs is based on Paragraph 97, subpara. 1, Code of Civil Procedure (ZPO).

The Division of Civil Matters has deemed it necessary to determine an amount in controversy of the appeal at this time based entirely on a free estimate in order to permit preliminary cost accounting.

Dr. Schmitz Dr. Kuhne Dr. Schneider

(Seal of the Cologne Higher Regional Court)

Executed by:
(Signed)
Court Clerk

* * * *

Certified to be a faithful and complete translation of the German text.

June 15, 1986

/s/ Anne E. Harland
ANNE E. HARLAND
Translator/Interpreter
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733 Courtenay Dr. NE
Atlanta, GA 30306

APPENDIX E

Certified German-English Translation

Federal German Constitutional Court
—1 BvR 574/86

In the Proceedings
Regarding
The Constitutional Complaint

Brought by

1. Mrs. Ingeborg Skowronek
   Bodinusstrasse 5, Cologne 60, Federal Republic of Germany (FRG),
2. the minor Beatrix Kaussen,
3. the minor Margret Kaussen,
4. the minor Eva-Maria Kaussen,
5. the minor Hilde Kaussen,

—the parties 2 through 5 being represented by their mother, the party 1—

—Counsel: Dr. Gerhard Hartstang and
Dr. Thomas Grote,
Attorneys-at-Law,
Zeunerstrasse 32, Essen-Bredeney, FRG—

against a) decree issued by the Cologne Higher Regional Court on April 28, 1986—2 W 34/86—,

b) decree issued by the Cologne Higher Regional Court on March 3, 1986—2 W 34/86—,

c) decree issued by the Cologne Regional Court on February 17, 1986—19 T 58/86—,

d) decree issued by the Cologne Local Court on January 24, 1986—71 N 641/85—

and application to issue an injunction,

the 2nd Panel of the First Division of the Constitutional Court, by Court Vice President Herzog and Judges Katzenstein and Henschel, has on June 6, 1986, unanimously decreed and held as follows:

> The Constitutional Complaint shall not be accepted for decision by this Court, in part as being inadmissible, in part as lacking an adequate chance of being successful. Likewise, the application for the issuance of an injunction will not be accepted.

Grounds:

Pursuant to § 90, paragraph 2, sentence 1, BVerfGG; (Law on Proceedings of Constitutional Court), it is a prerequisite of a constitutional complaint that all means to appeal have been exhausted. This prerequisite has not been complied with by the parties 2) through 5). In contrast to party 1), the parties 2) through 5) did not appeal the decree issued by the Cologne Local Court in the manner provided by law. The Constitutional Complaint therefore proves to be inadmissible.

The Constitutional Complaint is also inadmissible to the extent it is directed against the institution of the bankruptcy proceedings and those other decrees as affirmed by the decree issued by the Cologne Higher Regional Court on March 3, 1986, which decree is also subject to this complaint. In that regard, the party 1) failed to file the Constitutional Complaint within the time period mandated by § 93, paragraph 1, BVerfGG. The one-month period started running prior to April 28, 1986, the date on which the decree was issued by the Cologne Higher Regional Court, because the preceding decree by that court already qualified as a decision partially concluding the proceedings.

To the extent that the Constitutional Complaint is admissible, it is without merit. The challenged decrees

do not violate constitutional rights. The decrees remain within the restraints imposed on the judge by the constitutional principle of separation of powers in his interpretation of the law (Art. 20, paragraph 3, GG (Federal German Constitution)). By consistent practice, the Constitutional Court has recognized the courts' duty and right to further develop the law (*See* BVerfGE 65, 182 [190], as amended). The limits are exceeded only when a clear legislative objective to the contrary is present (*See* BVerfGE 9, 89 [102]). This is not case. According to the law, the Cologne Higher Regional Court was allowed to base its interpretation of the law primarily on the so-called universality principle, which is explicitly codified in § 1, paragraph 1, KO (Federal German Bankruptcy Code) (*See* BGHZ 88, 147 [150] as amended). The Bankruptcy Code cannot unequivocally be read to confine the debtor's duties to compliance with the obligations specifically stated in §§ 100, 101, KO. The purpose of the bankruptcy proceedings and the bankruptcy trustee's comprehensive authority to realize assets (§ 117, paragraph 1, KO) imposes a general obligation on the debtor to confer power of attorney inclusive of assets located in a foreign country.

The Constitutional Court is not to examine whether such interpretation by the Cologne Higher Regional Court is "correct" in terms of ordinary civil law. While the Koblenz Higher Regional Court shares the opinion advocated by the party 1), the Cologne Higher Regional Court, contrary to the complainant's position, was not bound by such opinion. Inconsistent interpretation of the law by different courts does not constitute a violation of Art. 3, paragraph 1, GG (BVverfGE 1, 332 [345]). A violation of the principle of equal treatment could only be taken into consideration if, according to sound interpretation of the principles expressed by the Constitution, such defective application of law were incomprehensible and likely to be based on inappropriate considerations.

(*See* BVerfGE 59, 128 [160 et seq.]). There is, however, no indication to that effect.

Art. 6, paragraph 1, GG has also not been violated. The separation of the complainant from her children was based on her own independent decision. Although, according to the complainant, her being abroad is the result of the order to confer power of attorney, this is only an unintended side-effect of the institution of the bankruptcy proceedings from which Art. 6, paragraph 1, GG does not afford constitutional protection. (*See* BVverfGE 6, 55 [77]; 12, 151 [176]).

Furthermore, the obligation to confer power of attorney does not violate complainant's constitutional right granted by Art. 14, paragraph 1, GG. The Constitutional Court has already held with respect to § 6, paragraph 1, KO that this provision defines the legal substance of property in terms of Art. 14, paragraph 1, sentence 2, GG (*See* BVerfGE 51, 405 [408]). This also holds true with respect to the obligation to confer power of attorney, which obligation has been lawfully derived by the competent courts from the law. In addition, the complainant's just concerns are protected by the opportunity to bring suit in order to obtain a separation or substitutional separation of assets from the estate in the event that any compulsory power of attorney should include assets which are not part of the estate (*See* §§ 43, 46, KO).

Furthermore, the order to impose a mail, telephone and telegraph ban does not violate Art. 10, paragraph 1, GG. The order is based on § 121 KO, which is a provision clear of any constitutional misgivings. The complainant failed to submit any facts which might have cast doubt on the legality of the order in her particular case. Besides, should such facts occur, she is entitled pursuant to § 121, paragraph 2, KO to file a petition at any time to have the court remove or limit the ban.

Finally, the Higher Regional Court with its decree of April 28, 1986, did not violate the complainant's right to a fair trial. In view of the fact that the trustee's brief of April 7, 1986, included only legal considerations which did not necessitate the complainant's supplying additional information to her counsel, a period of approximately two weeks prior to the decision by the court is still deemed appropriate.

This decree cannot be appealed.

Dr. Herzog Dr. Katzenstein Dr. Henschel

(Court Seal) Executed: Signed (Court Clerk)

Karlsruhe, June 11, 1986.

Certified to be a faithful and complete translation of the German text.
December 8, 1987

/s/ Anne Harland

ANNE HARLAND
Translator
Accredited by U.S. Department
of State
733 Courtenay Dr. N.E.,
Atlanta, GA 30306

APPENDIX F

CANADA

PROVINCE OF QUEBEC

DISTRICT OF MONTREAL

NO.: 500-11-001657-861

SUPERIOR COURT

(BANKRUPTCY DIVISION)

PRESIDING: THE HONOURABLE MR. JUSTICE JOHN E. GOMERY, J.S.C.

IN THE MATTER OF THE BANKRUPTCY OF:
THE ESTATE OF THE LATE HEINZ GUNTHER KAUSSEN,
Debtor

— and —

BAYERISCHE HYPOTHEKEN - UND WECHSEL-BANK AKTIENGESELLSCHAFT,
Petitioner

JUDGMENT

(Rendered orally July 3, 1986)

The petitioning creditor, a German bank, asks by its amended petition made under the authority of Section 28 of the Bankruptcy Act that an interim receiver be appointed to take possession of the assets of the estate of the late Heinz Gunther Kaussen, consisting of eleven (11) apartment buildings in Montreal. It is proposed that the interim receiver be empowered to control these assets and the rentals deriving from them, and to make all necessary disbursements, until such time as a final

adjudication has been made of the pending petition for a receiving order which the Petitioner has filed against the estate.

Both the petition for a receiving order and the petition for the appointment of an interim receiver are vigorously contested by counsel representing Mrs. Ingeborg Skowronek, who has accepted the Estate of the late Mr. Kaussen under benefit of inventory. Her written contestation of the bankruptcy petition and the evidence heard during seven days of enquête have raised a number of important factual and legal issues, which will only be decided after counsel for both parties have submitted written memoranda, followed by further oral argument scheduled for July 24th. There will then be a period for deliberation and the preparation of a written Judgment. All of which is to indicate that there will probably be a delay of anywhere up to two months before a Judgement on the merits of the bankruptcy proceedings can be anticipated. Given the complex legal issues and the value of the property and assets involved in this litigation, one must also be conscious of the possibility of an appeal. Therefore, if an interim receiver is appointed, his duties will extend beyond the more usual period of a week or two prior to a decision being rendered on a pending bankruptcy petition.

Section 28 authorizes the appointment of an interim receiver if it is shown to be necessary for the protection of the estate.

The proper interpretation to be given to these words has been the subject of a number of judicial decisions and there is no controversy between the parties as to the principles which apply. A leading case is *Re Stuart and Sutterby* 11 C.B.R. 1, where it was held that:

> ". . . the following essentials are necessary, although the facts may vary in almost every case:

> (1) it must be shown that a receiving order is almost certain to be made eventually, insofar as it can be determined at that stage what disposition will be made of the petition;
>
> (2) that unless an interim receiver is appointed to take possession to preserve the assets, there is grave danger that the assets existing on the date of the appointment will not all be recovered or be properly accounted for, when a receiving order is made."

To this may be added the headnote in *Re Big Eddy Shops Ltd.* (1977) 24 C.B.N. 90:

> "Section 28(1) of the Bankruutcy Act empowers the Court, in the exercise of its discretion, to make an interim receiving order, the cardinal principle being that the Court must be satisfied that it is necessary for the protection of the estate. It must be a matter of judgment in each case whether, on all the facts of the case presented to the Court, the conclusion is reached, judicially, that the appointment of the interim receiver is necessary to protect the interests of the estate, not only for the benefit of the applicant but all the creditors."

The facts giving rise to these proceedings may be summarized as follows.

The late Mr. Kaussen died on the night of 14-15 April 1985 in Cologne, Federal Republic of Germany, bequeathing his Estate by last will and testament to Ingeborg Skowronek with whom he had lived for many years. At the time of his death Mr. Kaussen was the owner of a very large number of buildings and properties in Germany, the United States of America and Canada. I will say more about the values of these properties later: for now it suffices to say that the value of the deceased's assets in Canada and the United States exceeds by a comfortable margin the liabilities, both secured and un-

secured, owing to creditors in those two countries. In Germany where the greater number of the deceased's investments had been made, the liabilities greatly exceed the assets.

Before his death Mr. Kaussen had encountered increasing difficulties in managing his real estate empire. Several banks to whom he was indebted had called their loans and were threatening foreclosure proceedings against his properties. Following his death and after obtaining probate of his will, Mrs. Skowronek attempted for a time to manage his properties and to make repayment arrangements with his principal creditors, but it eventually became apparent to her that the major creditors would not give her the time that she needed and she requested administration of the estate in accordance with German law. This was granted by a Judgment rendered in Cologne on July 17, 1985 and one Herman Haeck was named administrator of the Estate. After evaluating the situation Mr. Haeck requested sequestration of the estate, as a preliminary to a determination that the Estate was overindebted and subject to the Bankruptcy Code of Germany. This was ordered by the Court in Cologne on November 15, 1985 and Dr. Klaus Hubert Görg was named sequestrator. A series of evaluations of the assets were made by Dr. Görg and by others, and the liabilities of the Estate were also assessed, all of which indicated that the Estate was overindebted, which requires that it be placed in bankruptcy according to German law. On January 24, 1986 the Court of first instance in Cologne determined that Mr. Kaussen's Estate was bankrupt and named Dr. Görg as the administrator of the bankrutcy, an appointment which was confirmed at the first meeting of creditors on March 7, 1986.

A few figures should be given to indicate the size and importance of the German bankruptcy. I will give the figures in Deutschmarks. The proof has shown that a Deutschmark is worth approximately $0.60 in Canadian funds.

The real estate in Germany consisting of about 5,000 units is worth an estimated 200 million DM, although Dr. Görg fears that there may be less than that amount on realization. Against these properties are secured claims of more than 250 million DM. Foreign assets, that is to say those properties located in Canada, the U.S. and a residential property in Ireland, net of the claims of secured creditors, are worth 42 million DM. Overall in round figures the worldwide assets are estimated to be worth 280 million DM and the liabilities amount to 400 million DM leaving a shortfall of 120 million DM, or about $72,000,000.00 Canadian.

Mrs. Skowronek, since the appointment of Dr. Görg as sequestrator, has not offered him the co-operation and assistance which the German law requires of her, and has demonstrated an increasing interest in the Estate's North American properties, in the apparent hope that she will be able to salvage something for herself and her children from the equity in those properties. With this in mind she has accepted the succession under benefit of inventory in accordance with the civil law of this Province, by a Declaration made before Notary Paul Dorval at Montreal registry office on January 29, 1986. She has recently established her place of residence in this district and advises the Court that she intends to make her life here.

The Estate's assets in Quebec consist of eleven (11) multi-dwelling buildings in Montreal containing approximately 1,600 units which are currently leased to tenants who pay an aggregate monthly rental of about $600,000.00. All of the buildings at the time of the death of Mr. Kaussen were mortgaged; the balances outstanding totalled approximately $16,000,000.00. An evaluation of these properties has been prepared as of May 1, 1985 which indicates they were then worth $32,775,000.00. It has been updated as of June 1, 1986, and the value appears to have increased to $37,650,000.00. Mrs. Skow-

ronek recently received an offer to purchase them for the sum of $40,000,000.00.

Since her arrival in Canada in the autumn of 1985 Mrs. Skowronek has taken steps to reorganize the administration of the buildings, making important changes in the arrangements that were in effect prior to Mr. Kaussen's death. She has discharged the administrator, a company owned by Mr. Maurice Archambault, and has substituted in his place a corporation named 147362 Canada Inc. which she caused to be incorporated in 1985 at a cost of $21,200.00. She then sold the shares of 147362 Canada Inc. to a certain Mr. Bogyay of Waterloo, Ontario, and gave a mandate to the company to administer the buildings belonging to the Estate for a fee of 5% of the gross rentals. Thus the administration fee will be about $30,000.00 per month which contrasts sharply with the fee of 2% of gross rentals that was previously paid to Mr. Archambault's management company. Mrs. Skowronek and her employees are very critical of Mr. Archambault's management, but it is significant that 147362 Canada Inc. has not yet produced any appreciable increase in the rentals produced by the buildings, or effected any real decrease in the cost of operating them. No explanation has been offered to the Court as to why an increase of about $18,000.00 per month in administration fees was agreed to. Mr. Bogyay was not heard as a witness for reasons of health.

In March Mrs. Skowronek embarked upon a program of repayment of the existing mortgages with funds which she has borrowed for this purpose from The Mutual Trust Company, assigning to Mutual Trust as collateral security for these borrowings the rights which she acquired by way of subrogation upon payment of the existing mortgages. Article 1156(4) of the Civil Code provides that subrogation takes place by law in favour of a beneficiary heir who pays a debt of the succession with his own moneys. There is an interesting legal ques-

tion whether that article extends to the payment of a mortgage with borrowed funds using as security for such borrowings the assets of the succession, but that is a question that can be left for determination at another time. The repayment program has been pursued in spite of the institution of the present bankruptcy proceedings which commenced by the service of the petition on June 6: the subrogations and assignments all occurred after that date, although the negotiations with the mortgage creditors had commenced about two months earlier.

Mrs. Skowronek explains that these transactions are motivated by her desire to avoid a repetition of what happened in Germany, and by her wish to have control of the assets of the Estate together with a degree of flexibility in arranging for the payment of what is owed to Canadian creditors. It is more likely that her real preoccupation is her desire that the Canadian assets of the Estate should not be swallowed up in the bankruptcy in Germany, and that at least a portion of them be retained for her benefit.

This Judgment will not analyze in detail the subrogations and assignments that have taken place but it is noted that in each case Mrs. Skowronek has borrowed more than the amount needed to pay off the capital balance of the loan, the excess being employed to pay off overdue instalments, interest on overdue instalments, taxes and "mortgage commitment fees" charged by Mutual Trust. This latter item alone amounts to more than $90,000.00 to date and it is apparently Mrs. Skowronek's intention to charge them as a cost of the administration of the Estate. These fees would not have been necessary if she had simply prolonged the existing mortgages, which the mortgage lenders were willing and anxious to do.

The Estate derives no financial benefit from this mortgage repayment plan, and the mortgage commitment fees have increased the amount needed to discharge the mortgages, at the expense of the unsecured creditors. The

lower interest rates charged by Mutual Trust are of no benefit to the Estate either, since it will continue to pay Mrs. Skowronek the original interest rate on the mortgage loan she has paid off, whereas she will in turn pay the lower rate to Mutual Trust, pocketing the difference.

The legality of all of this is not a matter which the Court is called upon to decide at this stage of the proceedings, but a few remarks are in order. First of all, what she has done and proposes to do with respect to the remaining mortgages may be contrary to Section 26(2) of the Bankruptcy Act which prohibits the representative of a deceased debtor from making any payment or transferring any property until the bankruptcy petition has been disposed of. Secondly, the idea that a beneficiary heir is entitled to profit in any way from his administration of the Estate's property is contrary to the spirit of the civil law respecting the acceptance of Estates under benefit of inventory. Faribault *Traité de Droit civil du Québec*, Volume 4, Wilson & Lafleur, Montréal, at page 344 says that the administration of the succession by the beneficiary heir is gratuitous, and this is echoed by Mignault (*Le Droit civil Canadien* Vol. 3, Montréal, Théoret at page 375.)

In her contestation of the bankruptcy proceedings Mrs. Skowronek seeks a finding by the Court that the proceedings are unfounded because they are not directed against her as beneficiary heir, because the Petitioner has no right under German law to claim the payment of a sum of money from the estate for so long as the German bankruptcy proceedings are pending and because no act of bankruptcy in Canada has occurred. She urges upon the Court an interpretation of the Bankruptcy Act which would exclude from its application an Estate which has been accepted under benefit of inventory and intends to argue that the assets of the late Mr. Kaussen here in Canada are subject to the claims of his Canadian creditors only, and to a rateable proportion of his foreign creditors only.

It seems that there are only a few decisions of the Canadian Courts which give useful assistance on how to determine the rights and obligations of creditors in complex international bankruptcies of this kind. The Bankruptcy Act itself is not very helpful in directing the Court as to the position it should take with respect to a foreign trustee named by the Courts of the country where the deceased had his domicile. The legal difficulties are even greater due to the fact that the principal assets of the debtor are immoveable properties located in this jurisdiction, but which were purchased with funds taken out of his foreign patrimony.

These are matters which will have to be dealt with upon the merits of the petition for a receiving order. The question for determination now is whether or not the protection of the assets of the Estate requires the intervention of an interim receiver.

Petitioner has proved that the Estate is indebted to it for some 38 loans contracted in Germany in the sum of 65,849,546. DM as of April 30, 1986. It values the security which it has against German real estate at 21,500,000. DM, leaving an expected unsecured claim of about 44,500,000. DM or $26,700,000.00 Canadian. It has additional claims resulting from an additional 300 loan contracts, which are not proved.

A representative of Deutsch Hypothakenbank Frankfurt-Bremen A.G. testifies that it made some 95 loans to the late Mr. Kaussen, all of which are in default, and that as of May 30, 1986 it is owed 33,237,671. DM, against which there is security valued at 23,661,065. DM, so there is an expected unsecured claim of 9,576,606. DM, or $5.7 million Canadian.

A third German bank, Deutsch Kreditbank für Banfinanzierung A.G. is owed 4,539,000. DM or about $2,723,400.00 Canadian, against which it has security for only a minor part of its claim.

Mrs. Skowronek acknowledges that, as beneficiary heir and residuary legatee of the debtor, she is unable to pay these claims.

In the light of the bankruptcy Judgment already pronounced in Germany, the admitted inability of Mrs. Skowronek to pay the German liabiilties and the insolvency of the Estate taken as a whole, the Court is of the opinion that it should accept that Petitioner has made a prima facie case on its petition for a receiving order and that an eventual bankruptcy here is probable. The next question is whether the assets and revenues of the Estate require protection, for the period of time necessary to sort out the legal questions raised by the contestation.

There have been several instances of use of the rental revenues for purposes other than those required for the administration of the apartment buildings. Mrs. Skowronek has reimbursed herself out of these revenues for the costs of her travels to and from Germany, San Francisco and Atlanta where other assets of the Estate are located. These costs exceed $6,000.00. Although visits to her legal advisers in these cities may be necessary and advisable for a better understanding of her legal position, the Court fails to see how such travelling is in the interests of the creditors generally. Having accepted the estate under benefit of inventory, Mrs. Skowronek should have kept uppermost in her mind that she is acting in a fiduciary capacity towards the creditors.

Before acquiring a place of residence for herself in the Montreal area Mrs. Skowronek stayed in a local hotel and charges amounting to $9,557.00 were paid from the rental revenues. And she has advanced out of these same revenues to counsel representing her in these proceedings an amount of $240,000.00. She has paid her lawyer in Germany $28,205.00. Some of these disbursements for legal expenses may be related to the necessary costs associated with her administration of the assets of the

Estate, but the greater proportion of them must have been used in her personal interest. Such expenditures are unjustified. They indicate a disregard on the part of Mrs. Skowronek of her obligations towards the creditors of the Estate, whether they are located here or elsewhere. It is improper for her to benefit in any way from the assets of the estate until the claims against it have been dealt with. Although the payment of personal living and travelling expenses may represent only a small proportion of the revenues that are being received, the revenues do not exceed the expenses by such a great margin that additional costs of this kind are of no importance. As far as legal fees are concerned, she should finance them from her own resources like any other litigant, for the time being at least.

Considering the dissipation of the assets resulting from the administration fees being charged by 147362 Canada Inc., the benefits being derived by Mrs. Skowronek from the payment with subrogation of the mortgages, and the personal benefits she has received by way of travel, living and legal costs paid on her behalf, there is reason to fear that the assets of the estate will be misapplied in the future in a similar manner. The appointment of an interim receiver should prevent this. No prejudice to the Estate by such an appointment will take place; this is not a case which is comparable to that of a businessman or merchant whose business and reputation might suffer from the appointment of a receiver. It is desirable that constraints be placed upon the present administration of the real estate by Mrs. Skowronek and her agents. As was pointed out in the annotation to the decision of the Supreme Court of Ontario in *Re Imperial Broadloom Company* (1978) 29 C.B.R. 113, the appointment of an interim receiver is a protective measure and does not divest the debtor of his assets. It does not enable the receiver to interfere unduly in their administration. He is there to conserve the assets until the proceedings have been decided.

The petitioning creditor is a foreign bank and there is no evidence that it has any assets in this jurisdiction which would be available to satisfy an adjudication for damages, in the event that the petition for a receiving order is dismissed. I take it for granted that Mrs. Skowronek would wish to make some sort of claim against it in that event. Section 28 of the Act empowers the Court to require an undertaking with respect to possible damages from the Petitioner, and this is an appropriate case for the imposition of such an undertaking. Therefore it will be a condition of the present Judgment that a security in accordance with Rule 16 be furnished in the amount of $600,000.00 within ten days. In the meantime the interim receiver will be allowed to enter into possession of the Respondent's assets and security in accordance with Rule 16 in the sum of $600,000.00, as a guarantee for the payment of any damages caused to the Debtor in the event that the petition for a receiving order is dismissed, the whole within a delay of ten days from the date of the present Judgment, failing which the appointment of the interim receiver shall be immediately vacated;

ORDERS provisional execution of the present Judgment notwithstanding any appeal and without security except as hereinabove ordered.

With costs to follow suit.

/s/ John H. Gomery
JOHN H. GOMERY
J.S.C.

Me Bernard Woloshen, Q.C.,
Me Ian Rudnikoff,
Attorneys for the Petitioner

Me Mortimer Freiheit,
Attorney for the Debtor-Respondent.

TRUE COPY.

/s/ [Illegible]
Deputy-Registrar S.C.M.

APPENDIX G

COURT OF APPEAL

PROVINCE DE QUÉBEC
DISTRICT OF MONTREAL

No. 500-09-001253-863
500-11-001657-861

The eighth Day of February one thousand nine hundred and eighty-eight

CORAM: THE HONOURABLE McCARTHY
CHOUINARD
LEBEL

IN THE MATTER OF THE BANKRUPTCY OF:

THE ESTATE OF THE LATE HEINZ GUNTHER KAUSSEN,
Debtor/Appellant

and

BAYERISCHE HYPOTHEKEN - UND WECHSEL-BANK AKTIENGESELLSCHAFT,
Petitioner/Respondent

THE COURT, on the appeal from a judgment rendered by the Superior Court (the honourable John H. Gomery), District of Montreal, on September 26, 1986, ordering the issuance of a receiving order under the *Bankruptcy Act*, R.S.C. 1970, c. B-3, against the estate's property;

COUR D'APPEL

PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

No. 500-09-001253-863
500-11-001657-861

IN THE MATTER OF THE BANKRUPTCY OF:

THE ESTATE OF THE LATE HEINZ GUNTHER KAUSSEN,
Debtor/Appellant

and

BAYERISCHE HYPOTHEKEN - UND WECHSEL-BANK
AKTIENGESELLSCHAFT,
Petitioner/Respondent

CORAM:

MCCARTHY
CHOUINARD
LEBEL, JJ.C.A.

OPINION OF MCCARTHY, J.A.

This an appeal by the estate of the late Heinz Gunther (Gunter) Kaussen from a judgment of the Quebec Superior Court which ordered the issuance of a receiving order under the *Bankruptcy Act*, R.S.C. 1970, c. B-3, against the estate's property.

Kaussen died in Cologne, Federal Republic of Germany, where he was domiciled, on April 14, 1985. His will named Mrs. Ingeborg Skowronek, with whom he had been living for thirty years and by whom he had had four children, as his sole heir. His estate included what the Su-

perior Court judge describes as "an immense real estate empire", situated for the most part in Germany but also in other jurisdictions, including Quebec. That empire had been experiencing serious financial difficulties in Germany prior to Kaussen's death and these difficulties continued. Mrs. Skowronek, having failed to make appropriate arrangements with the German banks which were the principal creditors of the estate, applied to the Cologne court to have an administrator appointed to the estate. On July 14, two administrators, both accountants, were appointed. On November 13, the administrators applied to the Cologne court "for the opening of bankruptcy proceedings" against the estate on the ground of "over-indebtedness". Two days later, a sequestrator, Dr. Klaus-Hubert Görg, was appointed; subsequent decisions of the Cologne court made it clear that the foreign property of the estate was to be included in the sequestration. On December 13, Dr. Görg informed the Cologne court, over the objections of Mrs. Skowronek, that there were grounds for bankruptcy. Finally, on January 24, 1986, the Cologne court declared the estate bankrupt and provisionnaly appointed Dr. Görg as trustee. All of these proceedings were taken, of course, under German law. In the meantime, in November 1985, Mrs. Skowronek had come to Montreal, where she had assumed the administration and control of the real estate situated in Quebec. On November 21, 1985, she had executed here a notarial deed accepting under benefit of inventory "the estate of the said HEINZ GUNTER KAUSSEN".

In June 1986, the respondent, one of the German banks, alleging that a debt equivalent to $39,670,791.24 (Canadian) was owing by Kaussen, filed a petition for a receiving order against his estate under Canadian law, in the Superior Court. Around the same time, Dr. Görg instituted an action against Mrs. Skowronek in the Quebec Superior Court, an action by which he apparently seeks "exemplification of the decisions of the Cologne

court". This action, I understand, is still pending. We are seized, as mentioned above, with the appeal from the judgment which granted the petition for a receiving order.

Under the *Bankruptcy Act* a creditor may file a petition for a receiving order against a debtor if the debt owing to the creditor amounts to $1,000 and the debtor has committed "an act of bankruptcy" (s. 24(1)) within the six months prior to the filing of the petition (s. 25 (1)). The debtor must have been residing or carrying on business in Canada when he committed the act of bankruptcy (s. 2). The creditor need not have been residing or carrying on business in Canada; he need only have a claim provable under the Act (s. 2).

In the present case, the Superior Court judge concluded that the Kaussen estate had committed, within the preceding six months, the acts of bankruptcy described as follows in section 24(1) of the *Bankruptcy Act*:

> "24(1) A debtor commits an act of bankruptcy in each of the following cases:
>
> > (a) if in Canada or elsewhere he makes an assignment of his property to a trustee for the benefit of his creditors generally, whether it is an assignment authorized by this Act or not;
> >
> > .....
> >
> > (j) if he ceases to meet his liabilities generally as they become due."

The judge concluded that the declaration of bankruptcy by the Cologne court was an assignment within the meaning of section 24(1)(a). He also concluded that even though the estate had not ceased to meet its liabilities generally as far as Canadian creditors were concerned, section 24(1)(j) applied because the estate had ceased to pay its principal creditors, the German banks.

The estate argues that, by taking into account the declaration of bankruptcy by the Cologne court, the judge gave effect to a foreign judgment, contrary to the rule of Quebec law set forth in article 178 C.C.P. I cannot agree. The judge did not give effect to a foreign judgment; he simply took cognizance, in accordance with the provisions of section 24(1)(a), of something done "elsewhere". The estate also argues, however, that section 24(1)(a) refers to a *voluntary* act by a debtor and points out that Mrs. Skowronek contested the declaration of bankruptcy by the Cologne court. If Mrs. Skowronek's application to have an administrator appointed to the estate is to be considered such voluntary act, the estate argues, that occurred more than six months before the filing of the petition for a receiving order. The same argument is made regarding the application by the administrators "for the opening of bankruptcy proceedings". The latter arguments may perhaps have some merit. However, I find it unnecessary to deal with them because, as indicated below, I have concluded that whether or not there was an act of bankruptcy within the six-month period under section 24(1)(a), there was certainly an act of bankruptcy within such period under section 24(1)(j).

Section 24(1)(j), unlike section 24(1)(a) (and several other subsections of section 24(1)), does not explicitly state that the act of bankruptcy described therein may take place "in Canada or elsewhere". The judge concluded nonetheless that the legislator cannot have intended the "absurd result" of allowing a debtor carrying on business in Canada to avoid bankruptcy by paying his Canadian creditors while ceasing payments to foreign creditors. I agree. Under the *Bankruptcy Act*, as already noted, a creditor need not reside or carry on business in Canada. Nor need a claim provable have arisen in Canada (s. 95). Property includes property "situated in Canada or elsewhere" (s. 2). For the purpose of obtaining possession of and realizing upon a bankrupt's

property, a trustee has power to act as such "anywhere" (s. 12(6)). With those provisions in mind, I find it impossible to limit s. 24(1)(j) to liabilities owing to Canadian creditors. In the present case, the Kaussen estate had ceased to pay the German banks more than six months prior to the filing of the petition for a receiving order. However, the trial judge concluded that this was "a continuous default which also extended into the six-month period". In view of the bankruptcy proceedings in Germany, it was pointless, he said, for the respondent and the other banks to make repeated demands for payment: "the law in Germany prevented them from exercising any legal recourses for recovery of what was due to them, except to realize upon security". Here again, I agree. We are not faced in the present case with 'stale defaults', nor with the kind of situation dealt with by the British Columbia Court of Appeal in *Federal Business Development Bank vs Poznekoff*, 1983, 3 W.W.R. 1.

Another argument raised by the estate is that the respondent bank is not a creditor entitled to file a petition for a receiving order because its claim arises under German law and under German law the German bankruptcy proceedings prohibit it from suing thereon. But German law, like all foreign law, is a question of fact in Quebec courts. The Superior Court judge weighed the expert evidence presented to him concerning that question of fact and concluded that German law does not prohibit the creditor of a bankrupt debtor from suing to enforce his claim *in a foreign court*, particularly if the creditor's 'suit' is actually a petition in bankruptcy filed in the foreign court and is not designed to obtain a preference over other creditors. Such is the present case. Indeed, the judge concluded from the evidence that the respondent's petition for a receiving order had the "approval and support" of the trustee under the German bankruptcy, Dr. Görg. He added, citing, among other de-

cisions, *Allen vs Hanson*, 1891, 18 S.C.R. 667, that Canadian law is not offended by the prospect of a concurrent bankruptcy in another jurisdiction.

I have not been shown that the judge erred in this appreciation of the evidence or in these conclusions drawn therefrom.

The estate also argues — its other arguments are, I gather, subsidiary to this one — that the Superior Court judge erred in failing to consider the estate in Quebec as distinct from the estate in Germany (and from the estate in each of the other jurisdictions where parts of the Kaussen empire were situated). There is, it is argued, a "scission de la succession" and the real estate situated in Quebec cannot be held liable for the debts of the estate world-wide. The receiving order was thus, at the least, premature.

I cannot agree. It is not contested that, under the *Bankruptcy Act*, a petition for a receiving order may be filed against an estate (s. 26; s. 2, definitions of "debtor" and of "person"). True, article 6 of the Quebec Civil Code provides that Quebec law governs immoveables situated in Quebec but that moveables are governed by the law of the domicile of their owner. True also, Mrs. Skowronek accepted Kaussen's estate under benefit of inventory. It even appears that in some jurisdictions in the United States Mrs. Skowronek is not recognized as Kaussen's sole heir. None of this, however, supports the argument that there are as many estates as there are jurisdictions involved. Quebec recognizes only one estate, although that estate may be subject to the laws of more than one jurisdiction.(*) The extent

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(*) We are not faced here with the situation considered by this Court in *Estate Taggart vs Castigliola*, 500-09-001321-777, January 23, 1980. In that case, it was pointed out that the *common law*

to which the real estate situated in Quebec may be held liable for the debts of the estate world-wide is not something that must be determined on a petition for a receiving order. If he encounters difficulties in that regard, the trustee, once appointed, may apply to the court for directions, pursuant to section 16 of the *Bankruptcy Act*. What the court determines on a petition for a receiving order is whether the petitioning creditor has a claim provable in bankruptcy amounting to $1,000 against a debtor who, within the preceding six months, when resident or carrying on business in Canada, committed an act of bankruptcy. Section 25(7) gives the court discretion to dismiss the petition even if it determines that those conditions exist but in the present case the Superior Court judge decided to grant the petition. It has not been shown that he exercised his discretion improperly. This is what he said, having quoted section 25(7):

> "Very important assets and amounts of money require to be administered. Since the assets will be insufficient to pay all of the liabilities, difficult decisions will have to be made concerning the rights of creditors claiming preference, the valuation of security held by secured creditors, and the prices at which assets are to be sold. For so long as the administration of the Estate's affairs continues, the collection of rentals and payment of the operating expenses of the buildings will require the services of honest and experienced building managers. These matters are best left to a licensed trustee, answerable to the creditors and to the Court in a way that

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considers an estate to be a distinct legal entity, whereas Quebec law merely permits the heirs to be summoned collectively in legal actions instituted within a certain delay (article 116 C.C.P.). Since the delay had expired, the petition for a receiving order against a Quebec estate was dismissed. Such is not the present case. It is therefore appropriate, in my view, to say here that Quebec 'recognizes' the estate.

a beneficiary heir is not. The beneficiary heir in this case has interest opposed to those of the creditors: a trustee will be neutral. The Court's discretion should not be exercised so as to dismiss the petition.

The manner of distribution of the Estate's assets to its creditors will be complicated by the presence of the German trustee, and the location of assets in several jurisdictions. These are matters that may be left to the administration of the trustee, and to such further directions as the Court may be called upon to give him."

I agree.

Some closing remarks in answer to miscellaneous points raised by the estate: It is irrelevant to argue that the respondent bank, instead of instituting bankruptcy proceedings in Quebec, could have sued in Quebec to recover its claim; the claim is not really contested. Nor can the estate seriously argue that the bank made no demand for payment. Concerning the argument that Canadian courts will not enforce foreign tax laws, it suffices to point out that Kaussen's German tax liabilities are certainly enforceable in Germany. Finally, as regards the action in "exemplification" instituted in Quebec courts by Dr. Görg, I have already noted the Superior Court judge's finding that the petition for a receiving order had Dr. Görg "approval and support".

I would dismiss the appeal with costs.

J.C.A.

APPENDIX H

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 86-04341

IN RE KLAUS HUBERT GOERG, as Trustee in Bankruptcy under the laws of the Federal Republic of Germany for the Estate of Heinz Guenter Kaussen

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PETITION BY GERMAN BANKRUPTCY TRUSTEE FOR ANCILLARY ADMINISTRATION PURSUANT TO 11 U.S.C. §304

Klaus Hubert Goerg, as Trustee in Bankruptcy of the Estate of Heinz Guenter Kaussen (the "Estate"), duly selected and acting in accordance with the laws of the Federal Republic of Germany, hereby files this petition pursuant to Section 304 of the Bankruptcy Code (11 U.S.C. § 304) to commence a case ancillary to a foreign proceeding, and shows the Court the following:

1.

Petitioner is the duly selected and acting bankruptcy trustee of the Estate of Heinz Guenter Kaussen, a resident and domiciliary of the Federal Republic of Germany, now deceased. Petitioner was designated as such by an order of the District Court of Cologne dated January 24, 1986, (the "Order of Adjudication"). Petitioner is, therefore, a foreign representative of an estate in a foreign proceeding as defined in paragraphs (20) and (21) of Section 101 of the Bankruptcy Code, 11 U.S.C. § 101.

Petitioner's authority as Trustee to take charge of all assets belonging to the Estate wherever located was expressly affirmed on appeal in contested proceedings by a decision dated February 17, 1986 of the Superior Court of Cologne and by two decisions dated March 3, 1986 and April 28, 1986 of the Cologne Court of Appeals, the latter being a Court of last resort in these matters.

2.

This is a case brought pursuant to § 304 of the Bankruptcy Code, 11 U.S.C. § 304, as a case ancillary to a foreign proceeding. Property of the Estate, turnover of which is sought hereby, is located in the Northern District of Georgia. Proceedings, against which stays are sought hereby, are pending in state courts located in the Northern District of Georgia. Thus, venue is proper pursuant to Section 1410 of the Judicial Code, 28 U.S.C. § 1410.

3.

Prior to his death in April 1985, Kaussen was at all times a resident and citizen of the Federal Republic of Germany. Kaussen's business enterprises were headquartered in Cologne, Germany, a majority of the assets of the Estate are located in the Federal Republic of Germany, and a majority of the creditors of the Estate are located in the Federal Republic of Germany.

4.

The Estate is being liquidated in Kaussen's domicilary jurisdiction under the supervision of the Bankruptcy Division of the District Court of Cologne pursuant to Section 215 of the Konkursordnung (§ 215 of the German Bankruptcy Act). By the Order of Adjudication and by the final decisions of the German appellate courts, hereinbefore mentioned, it has been determined, despite the active opposition of the sole beneficiary under Kaussen's will, that the Estate is insolvent. At the time of Kaus-

sen's death, his known liabilities exceeded the fair market value of his known assets worldwide by more than DM-121,000,000, or by more than $55,000,000 when this figure is converted from Deutsch Marks to dollars at current exchange rates. A report of the Trustee setting forth the assets and liabilities of the Estate has been filed with the District Court of Cologne and delivered to those persons in the United States who have requested same.

5.

The Order of Adjudication and the subsequent decisions of the German appellate courts hereinbefore mentioned were duly entered pursuant to German law and provide to Petitioner all powers necessary to enable him to take possession, in accordance with the applicable laws of the respective jurisdictions, of all foreign property belonging to the Estate, and to liquidate such property for the benefit of creditors worldwide. Such orders also expressly prohibit interference by the purported heirs of Kaussen in the Petitioner's administration of said assets. The rights of said heirs, all of whom are residents of Germany, have been duly and finally adjudicated by the Courts of Germany whose decisions are entitled to recognition and enforcement by this and other courts of the United States.

6.

Notwithstanding the beforementioned decisions of the German courts, which were affirmed on appeals to the highest court available under German law, claims against assets of the Estate are currently being pursued by Kaussen's creditors, heirs and others in separate, independent proceedings pending in this district and elsewhere in the United States. Said claims, some of which relate directly to issues which have already been adjudicated and all of which interfere with the orderly and equitable administration of the Estate pursuant to controlling law, are in direct contravention of orders of the German courts.

7.

In proceedings being conducted without regard to those pending in the Federal Republic of Germany, administrators appointed by state courts in Georgia and California have independently taken possession of property of the Estate located in their respective states, are in the process of liquidating same, and have declined either to acknowledge the rights of creditors who have filed claims in the German proceedings, or to recognize the authority of this Petitioner as Trustee to take possession of assets of the Estate located in the United States. Edgardo L. Parungao is purporting to act as the independent administrator of the property of the Estate located in Georgia.

8.

Relief pursuant to § 304 will assure the economical, uniform and expeditious administration of the Estate and will promote the interests of justice and equity and the policies of the United States as expressed in the Bankruptcy Code in that:

(a) Recognition of the German proceeding pursuant to § 304 will provide all claimants with consistent and equal treatment, regardless of where they are located;

(b) German bankruptcy law is consistent with principles of due process under the United States Constitution;

(c) German law allows recovery of preferences and fraudulent conveyances that would otherwise go unrecovered;

(d) The German court will treat all claimants, foreign and domestic, equally under German law;

(e) The principles of comity recognized by the courts of the United States require that the or-

ders of the German courts be granted respect and enforced;

(f) Claimants, who are citizens and domiciliaries of Germany, will not be permitted to circumvent valid orders of German courts by relitigating their claims in courts of the United States;

(g) The rights of those creditors of the Estate domiciled within the United States will be protected by the processes of this Court;

(h) Creditors will be able to protect their interests without having to file and prove their claims in each of the various jurisdictions where assets are located; and

(i) Proceedings under § 304 will eliminate the risk of multiple lawsuits involving the same issues in different courts and, thereby, eliminate the possibility of inconsistent orders and relieve the judiciary of unnecessary burdens while protecting the Estate against unnecessary litigation expenses.

WHEREFORE, Petitioner prays that this Court: (a) issue summons for service upon the parties against whom relief is sought and order them to show cause why the prayers of this petition should not be granted; (b) issue an appropriate stay order restraining and enjoining other proceedings with respect to the administration of the assets of the Estate, and with respect to the prosecution of claims by creditors, heirs and others against the Estate or against any of the property of the Estate; (c) direct that the property of the Estate be turned over to Petitioner; (d) order an accounting of the assets of the Estate by any party who has had possession or control of such assets since inception of the Estate; (e) order examinations and production of documents pursuant to Rule 2004 of the Rules of Bankruptcy Pro-

cedure; and (f) grant Petitioner such other and further relief as this Court deems just and equitable.

/s/ Thomas C. Shelton
THOMAS C. SHELTON
Georgia Bar No. 640800

/s/ Dennis S. Meir
DENNIS S. MEIR
Georgia Bar No. 501100

Of Counsel:

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UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 86-04341

IN RE KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen pursuant to the laws of the Federal Republic of Germany

---

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the Summons dated June 13, 1986 together with a copy of the petition filed in this proceeding on the party listed below by depositing copies of the same into the United States mail, postage prepaid, and addressed as follows:

Edgardo L. Parungao
Guenter Kaussen Properties
800 Peachtree Street, NE
Suite 204
Atlanta, Georgia 30308

This the 13th day of June, 1986.

/s/ Robert Goldstein
ROBERT GOLDSTEIN

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 86-04341

IN RE KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the estate of Heinz Guenter Kaussen pursuant to the laws of the Federal Republic of Germany

---

CERTIFICATE

I hereby certify that I have this day mailed a copy of the petition filed this day in this proceeding to the parties listed below by depositing copies of the same into the United States mail, postage prepaid, and addressed as follows:

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Cologne, West Germany

Dr. Hans J. Luer
Schlutter, Luer & Gorg
Rechtsanwalte
Theodor-Heuss-Ring 62
D-500 Koln 1
West Germany

This the 13th day of June, 1986.

/s/ Robert Goldstein
ROBERT GOLDSTEIN

APPENDIX I

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Case No. 86-04341

IN RE KLAUS HUBERT GOERG, as Trustee in Bankruptcy for the ESTATE OF HEINZ GUENTER KAUSSEN pursuant to the laws of the Federal Republic of Germany

---

AMENDED AND RESTATED PETITION BY GERMAN BANKRUPTCY TRUSTEE FOR ANCILLARY ADMINISTRATION PURSUANT TO 11 U.S.C. § 304

Klaus Hubert Goerg, as Trustee in Bankruptcy of the Estate of Heinz Guenter Kaussen acting in accordance with the laws of the Federal Republic of Germany, pursuant to Section 304 of the Bankruptcy Code (11 U.S.C. § 304) hereby files this amended petition, which includes advice to the Court of developments since the filing of the petition commencing this case ancillary to a foreign proceeding, and shows the Court the following:

1.

Heinz Guenter Kaussen, now deceased, was a resident and domiciliary of the Federal Republic of Germany. Petitioner was designated the Bankruptcy Trustee of Kaussen's estate by an order of adjudication entered by the Bankruptcy Division of the Cologne Local Court on January 24, 1986, following proceedings contested by Kaussen's heirs. Petitioner is, therefore, a foreign representative of an estate in a foreign proceeding as defined in paragraphs (22) and (23) of Section 101 of the Bank-

ruptcy Code, 11 U.S.C. § 101. Petitioner's authority as Trustee to take charge of all assets belonging to the Kaussen estate wherever located was expressly affirmed following appeals by his heirs, first by a decision of the Cologne Regional Court, dated February 17, 1986, and then by two decisions of the Cologne Higher Regional Court of Appeals, the court of last resort in these matters, dated March 3, 1986, and April 28, 1986. The Federal German Constitutional Court, in a decision dated June 6, 1986, refused to review a constitutional challenge by the heirs to the earlier decisions, finding the challenge to be without merit.

2.

Venue is proper under Section 1410 of the Judicial Code, 28 U.S.C. § 1410. Property of the Kaussen estate, turnover of which is sought hereby, is located in the Northern District of Georgia. Proceedings, against which stays are sought hereby, are pending in state courts located in the Northern District of Georgia.

3.

At all times relevant, Kaussen was a citizen and resident of the Federal Republic of Germany, domiciled in Cologne. Kaussen's business enterprises were headquartered in Cologne, Germany, a majority of the assets of the Kaussen estate are located in the Federal Republic of Germany, and a majority of the estate's creditors, measured both by number and amount of their claims, are located in the Federal Republic of Germany.

4.

The estate is being liquidated in Kaussen's domiciliary jurisdiction under the supervision of the Bankruptcy Division of the Cologne Local Court pursuant to Section 215 of the German Bankruptcy Act. By the order of adjudication entered January 24, 1986, and by the final decisions of the German appellate courts, it has been

determined that the Kaussen estate is insolvent and that Dr. Goerg has the responsibility for the administration of his assets wherever located. These determinations were made despite the active opposition of Ingeborg Skowronek, Kaussen's "life companion" and the sole beneficiary under Kaussen's will, who was acting on her own behalf and on behalf of the four minor children born to her and Kaussen, who were his only heirs at law ("the Kaussen children"). At the time of Kaussen's death, his known liabilities exceeded the fair market value of his known assets worldwide by more than DM-121,000,000. A report of the Trustee setting forth the assets and liabilities of the Kaussen estate has been filed with the Cologne Local Court and delivered to those persons in the United States who have requested same.

5.

The order of adjudication and the subsequent decisions of the German appellate courts were duly entered pursuant to German law and provide Petitioner all powers necessary to enable him to take possession, in accordance with the applicable laws of the respective jurisdictions, of all property belonging to the Kaussen estate, wherever located, and to liquidate such property for the benefit of creditors worldwide. Such orders also expressly prohibit interference by the heirs of Kaussen in the Petitioner's administration of said assets. The rights of said heirs, all of whom are citizens of Germany and were residing there at the time the bankruptcy proceedings were initiated and appealed, are governed by the laws of the Federal Republic of Germany. Their rights have been duly and finally adjudicated by the courts of Germany in proceedings in which Skowronek actively participated on her own behalf as the sole beneficiary under Kaussen's will and on behalf of the Kaussen children, his only other heirs. The decisions of those courts are entitled to recognition and enforcement by this Court pursuant to Section

304 of the Bankruptcy Code and well-established principles of international comity and conflicts of laws.

6.

Notwithstanding the before-mentioned decisions of the German courts, claims against assets of the Kaussen estate are currently being pursued by Kaussen's creditors, heirs and others in numerous separate and independent proceedings pending in this district and elsewhere in the United States. Some of those claims relate directly to issues that have already been adjudicated in Germany, interfere with the orderly and equitable administration of the Kaussen estate pursuant to controlling law and are in direct contravention of orders of the German courts.

7.

In proceedings being conducted without regard to those pending in the Federal Republic of Germany, administrators appointed by state courts in Georgia and California have independently taken possession of property of the Kaussen estate located in their respective states, are in the process of liquidating same, and have declined either to acknowledge the rights of creditors who have filed claims in the German proceedings, or to recognize the authority of this Petitioner as Trustee to take possession of assets of the Kaussen estate located in the United States.

8.

A multiplicity of uncoordinated and conflicting actions have been filed in Georgia and California, seeking to dispose of assets of the Kaussen estate. Included among these, at a minimum, are the following:

(a) *In re: Estate of Guenter Kaussen, Deceased*, Civil Action No. D-22839 in the Superior Court of Fulton County, Georgia since July 1985, approving settlement of will contest between

Skowronek and the Kaussen children, but retaining jurisdiction, as more fully described in paragraph 9 below;

(b) *In re: Estate of Guenter Kaussen, Petition of Administrator with Will Annexed for Declaratory Judgment and Equitable Relief*, Civil Action No. D-22830, pending in the Superior Court of Fulton County, Georgia since September 15, 1987, as more fully described in paragraph 10 below;

(c) *In re: Estate of Guenter Kaussen, Deceased*, Estate No. 125548, the estate administration, pending in the Probate Court of Fulton County, Georgia since April 1985, as more fully described in paragraph 11 below:

(d) *Gary D. Zweifel (Guardian Ad Litem for Beatrix Kaussen, Margret Kaussen, Eva Marie Kaussen, and Hilde Kaussen) v. Dr. Klaus Hubert Goerg, Deutsche Kreditbank Fuer Baufinanzierung Aktiengesellschaft, Bayerische Hypotheken-Und Wechsekbank Aktiengesellschaft, Deutsche Hypothekenbank Frankfurt-Bremen Aktiengesellschaft, and Edgardo L. Parungao*, Civil Action No. D-51539, an action for year's support pending in the Superior Court of Fulton County, Georgia since January 12, 1988, on appeal from a judgment of the Probate Court of Fulton County denying support to the Kaussen children, as more fully described in paragraph 12 below;

(e) *Dr. Klaus Hubert Goerg, Trustee v. Ingeborg Skowronek*, Civil Action No. D-56445, a fraudulent conveyance action pending in the Superior Court of Fulton County, Georgia since May 20, 1988, now in default, as more fully described in paragraph 13 below;

(f) *Dr. Bruno M. Kubler, Trustee v. Ingeborg Skowronek v. Citizens and Southern National Bank and Citizens and Southern Trust Company, Inc. v. Dr. Klaus Hubert Goerg, Trustee,* Garnishment No. 212826, pending in the State Court of Fulton County, Georgia since March 31, 1988, as more fully described in paragraph 14 below;

(g) *In re: Estate of Guenter Kaussen, Deceased,* Civil Action No. 240596, the family allowance proceeding prosecuted in the Probate Division of the Superior Court of the State of California for the City and County of San Francisco, which was initiated on April 11, 1986, by John Sampson, guardian ad litem of the Kaussen children, as more fully described in paragraph 15 below;

(h) *In re: Estate of Guenter Kaussen, Deceased,* Civil Action No. 240596, the estate administration proceeding pending in the Probate Division of the Superior Court of the State of California for the City and County of San Francisco since June 11, 1985, as more fully described in paragraph 16 below;

(i) *Bayerische Hypotheken-Und Wechsel-Bank Aktiengesellschaft and Dr. Klaus Hubert Goerg v. James Scannell,* Civil Action No. 866205, pending in the Superior Court of the State of California for the City and County of San Francisco since July 20, 1988, as more fully described in paragraph 16;

(j) *Deutsche Hypothekenbank Frankfurt-Bremen Aktiengesellschaft and Dr. Klaus Hubert Goerg v. John F. Sampson,* Civil Action No. 893855, pending in the Superior Court of the State of California for the City and County of San

Francisco since June 28, 1988, as more fully described in paragraph 16 below; and

(k) *Deutsche Kreditbank Fuer Baufinanzierung Aktiengesellschaft and Dr. Klaus Hubert Goerg v. John F. Sampson*, Civil Action No. 893856, pending in the Superior Court of the State of California for the City and County of San Francisco since June 28, 1988, as more fully described in paragraph 16 below.

9.

The Georgia probate administration (referred to in paragraph 8(a) above) was initiated when the Kaussen will was filed for probate and Kaussen's attorney in Georgia, Eric Ranney, was appointed temporary administrator. The probate was contested by the Kaussen children through their guardian ad litem, Gary Zweifel. Skowronek and the guardian ad litem subsequently entered into a settlement agreement under which the will was to be probated and Skowronek and the Kaussen children each were to be entitled to a twenty percent share of the estate. This settlement agreement was approved by the Fulton County Superior Court. The will thereafter was probated in solemn form, and, at the request of Skowronek and the guardian ad litem for the Kaussen children, Edgardo Parungao, a former employee and friend of Kaussen, was named Administrator With The Will Annexed to administer Kaussen's estate in Georgia.

10.

Parungao on September 15, 1987, filed a declaratory judgment action in the Superior Court of Fulton County (as identified in paragraph 8(b) above). In that action, Parungao sought *inter alia* to have the Superior Court declare that the actions he has taken and the disbursements he has made from the Georgia assets collected by him were reasonable and proper. The Superior Court has

taken no action on any matter raised in the declaratory judgment action.

11.

On September 15, 1988, Parungao filed a petition in the Probate Court of Fulton County, Georgia, seeking final approval of his accounts and of all disbursements made to date from assets of the Kaussen estate in Georgia. A hearing on the petition is scheduled for November 7, 1988, at 10:00 a.m.

12.

Yet another action pending in the Superior Court of Fulton County (as identified in paragraph 8(d) above) is the application for year's support filed by Gary D. Zweifel, the guardian ad litem of the Kaussen children. The action is before the Court for a trial *de novo* after a nearly week-long trial in the Fulton County Probate Court resulted in a judgment against the Kaussen children and in favor of Dr. Goerg. In entering judgment for Dr. Goerg, the Probate Court rejected the award of appraisers who, acting *ex parte* at the request of the guardian ad litem, granted the Kaussen children $1.5 million for one year's support, the award being payable out of the Georgia assets of the Kaussen estate. The estate faces the prospect of extensive and costly further trial court proceedings, as well as likely appeals, to establish that the Kaussen children are not entitled to any additional support from the Kaussen estate. The Honorable Floyd E. Propst in December 1987, at the conclusion of the year's support trial, expressed on the record his concern that no centralized proceeding, coordinated with the bankruptcy proceedings in Germany, was then being conducted in the United States for the administration of the assets of the Kaussen estate located in this country.

13.

Dr. Goerg was compelled to file a fraudulent conveyance action (identified in paragraph 8(e) above) to re-

cover certain funds, belonging to the Kaussen estate, that are the proceeds of a fraudulent transfer Kaussen made to Skowronek shortly before his death. The funds are the proceeds of the April 1, 1985, sale of two parcels of real estate that Kaussen owned and as to which Skowronek had no interest or claim. Although at the time of the sale Kaussen was insolvent, he nevertheless directed that the proceeds from the sale of the two parcels be paid to Skowronek. She was not a creditor of Kaussen and did not give any consideration for the transfer. Skowronek has held the subject funds, amounting to approximately $1.2 million in an account with Citizens and Southern Trust Company, Inc. ("C&S") and has collected interest on them since August 1985. Since learning of the existence of this account, Dr. Goerg has maintained that the question of ownership of these funds should be determined by this Court in the context of an ancillary bankruptcy proceeding under Section 304. *See In re Metzeler*, 79 B.R. 674 (Bankr. S.D.N.Y. 1987). However, upon the initiation of the garnishment proceeding (identified in paargraph 8(f) above and more fully described in paragraph 14 below), it became apparent that the $1.2 million fund in the C&S account was about to be seized by a German creditor of Skowronek and that protection of the ownership interest of the Kaussen estate required the immediate filing of the fraudulent conveyance action in Fulton County Superior Court, pending the remand of this Section 304 proceeding from the U.S. Court of Appeals to this Court and further action by this Court.

14.

Dr. Bruno M. Kubler is the German bankruptcy trustee of a German corporation that was owned by Kaussen and Skowronek. Dr. Kubler, as trustee, obtained a personal judgment from a German court against Skowronek based on her conduct as a former director of the corporation, domesticated that German judgment in Georgia and

filed the garnishment action (identified in paragraph 8 (f) above) in the State Court of Fulton County to seize the funds held by C&S that had been fraudulently conveyed by Kaussen to Skowronek. In answer to Dr. Kubler's summons of garnishment, C&S paid the $1.2 million into the registry of the State Court of Fulton County, where it is now held. To prevent these funds from being lost to the Kaussen estate and its creditors, Dr. Goerg has been forced to file a claim in the garnishment action and to litigate in that forum, as well as in Fulton County Superior Court, the question of ownership of the property Kaussen fraudulently conveyed to Skowronek.

15.

The Kaussen children through their guardian ad litem in California, John Sampson, a former associate of Kaussen and a friend of the Kaussen family, petitioned the Superior Court in California (in the suit identified in paragraph 8(g) above) for an award of a family allowance, just as they petitioned the Fulton County Probate Court for an award of one year's support. Despite Dr. Goerg's opposition, the court in California awarded the Kaussen children an allowance of $108,000.00 from which no appeal was taken. As of November 1987, at least a portion of the $108,000 remained in the possession of John Sampson, in his capacity as guardian ad litem of the Kaussen children.

16.

Sampson, who now also serves as the administrator of Kaussen's California probate estate after being nominated by Skowronek and the Kaussen children to replace the Public Administrator appointed by the California Superior Court, has refused to recognize the status of Dr. Goerg and has opposed his efforts to obtain recognition to coordinate the administration of the California assets of the Kaussen estate with administration of assets in

Germany, Georgia, and elsewhere. As a result, Dr. Goerg and certain German creditors of the estate have been compelled to file three actions against Sampson to establish the multi-million dollar indebtedness owing to those creditors. These three actions (identified in paragraphs 8(i), (j) and (k) above) are in the midst of extensive discovery. Dr. Goerg anticipates that obtaining the needed judgments against the California administrator will be troublesome and expensive and will place an undue burden on the California and German assets of the estate. This expense will be unnecessary if the relief herein sought is granted.

17.

The multiplicity of uncoordinated actions purporting to dispose of the assets of the Kaussen estate greatly increases the possibility of, and to some extent has already led to, inconsistent judgments and orders, preferential recovery to certain claimants, relitigation of claims, delay, and increase in administrative costs to the Kaussen estate.

18.

Relief pursuant to § 304 will assure the economical, uniform and expeditious administration of the Kaussen estate and will promote the interests of justice and equity and the policies of the United States as expressed in the Bankruptcy Code in that:

(a) Recognition of the German proceeding pursuant to § 304 will provide all claimants with consistent and equal treatment, regardless of where they are located;

(b) German bankruptcy law is consistent with principles of due process under the United States Constitution;

(c) German law allows recovery of preferences and fraudulent conveyances that might otherwise go unrecovered;

(d) The German court will treat all claimants, foreign and domestic, equally under German law;

(e) The principles of comity recognized by the courts of the United States require that the orders of the German courts be granted respect and enforced;

(f) Claimants, who are citizens of Germany, will not be permitted to circumvent valid orders of German courts by relitigating their claims in courts of the United States;

(g) The rights of those creditors of the Kaussen estate domiciled within the United States will be protected by the processes of this Court;

(h) Creditors will be able to protect their interests without having to file and prove their claims in each of the various jurisdictions where assets are located; and

(i) Proceedings under § 304 will eliminate the risk of multiple lawsuits involving the same issues in different courts and, thereby, eliminate the possibility of inconsistent orders and relieve the judiciary of unnecessary burdens while protecting the estate against unnecessary litigation expenses.

19.

The parties against whom relief is sought in this proceeding are:

(a) INGEBORG SKOWRONEK, a citizen of the Federal Republic of Germany, who now resides at 233 Hampshire Drive, Beaconsfield, Province of Quebec, Canada;

(b) BEATRIX KAUSSEN and MARGRET KAUSSEN, citizens of the Federal Republic of Ger-

many, who now reside at 233 Hampshire Drive, Beaconsfield, Province of Quebec, Canada, and EVA MARIA KAUSSEN and HILDE KAUSSEN, citizens of the Federal Republic of Germany, who may be served by service on their guardian ad litem in Georgia, Gary D. Zweifel;

(c) GARY D. ZWEIFEL, ESQ., a resident of Fulton County, Georgia, who may be served at the offices of Lokey & Bowden, Suite 2500, Tower Place, 3340 Peachtree Road, N.E., Atlanta, Georgia 30026;

(d) EDGARDO PARUNGAO, a resident of Rockdale County, Georgia, who may be served at the offices of Guenter Kaussen Properties, Suite 204, 800 Peachtree Street, N.E., Atlanta, Georgia 30308;

(e) JOHN F. SAMPSON, a resident of San Francisco County, California, who may be served at his offices at 10 United Nations Plaza, Suite 650, San Francisco, California 94102; and

(f) DR. BRUNO KUBLER, a citizen of the Federal Republic of Germany, who may be served by service on his attorney of record in Georgia, Mark L. Golder, Esq. of Macey, Wilensky, Cohen, Whittner & Kessler, Suite 900, 133 Carnegie Way, Atlanta, Georgia 30303.

WHEREFORE, Petitioner prays that this Court: (a) issue summons for service upon the parties against whom relief is sought and order them to show cause why the prayers of this petition should not be granted; (b) issue an appropriate stay order restraining and enjoining other proceedings with respect to the administration of the assets of the Kaussen estate, and with respect to the prosecution of claims by creditors, heirs and others against the Kaussen estate or against any of the property of the estate; (c) direct that the property of the estate

be turned over to Petitioner; (d) order an accounting of the assets of the estate by any party who has had possession or control of such assets since inception of the estate; (e) order examinations and production of documents pursuant to Rule 2004 of the Rules of Bankruptcy Procedure; and (f) grant Petitioner such other and further relief as this Court deems just and equitable.

/s/ Thomas C. Shelton
THOMAS C. SHELTON
Georgia Bar No. 640800

/s/ Dennis S. Meir
DENNIS S. MEIR
Georgia Bar No. 501100

/s/ Robert Goldstein
ROBERT GOLDSTEIN
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